This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

**Usage guidelines**

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

**About Google Book Search**

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

HL 5J75 V

Digitized by Google

CAN

Bd. Oct. 1905

HARVARD LAW LIBRARY.

Received Oct. 21, 1905

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

THE

# WESTERN LAW REPORTER

CANADA

AND

# INDEX-DIGEST

JANUARY-AUGUST, 1905

EDITOR :
E. B. BROWN, ESQUIRE,
BARRISTER, ETC.

VOLUME I.

TORONTO :
THE CARSWELL COMPANY, LIMITED
1905

KE
156
.W547
1905
v.1

Digitized by Google

Rec. Oct. 21, 1905

Digitized by Google

# TABLE OF THE NAMES OF CASES

## REPORTED IN

## VOLUME I. OF THE WESTERN LAW REPORTER (CANADA).

---

A.


Abell (John) Co. v. Hornby, 3.
Abell (John) Co. v. Long, 24.
Alaska Mercantile Co. v. Ballantine, 504.
Alaska Packers' Association v. Spencer, 103, 188, 567.
Alberta Dominion Election, Re, 486.
Alloway v. Rural Municipality of St. Andrews, 407.
Anglo-Klondike Mining Co. v. Cook, 322.
Attorney-General for British Columbia v. Canadian Pacific R.W.Co., 299.
Attorney-General for N. W. T. and Canada Settlers Loan and Trust Co., Re, 225.
Ayotte, Re, 79.


B.


Bakewell v. Mackenzie, 68.
Barrette v. Canadian Bank of Commerce, 171.
Barrie v. Wright, 412.
Bell v. Rokeby, 124, 531.
Bell v. Winnipeg Electric Street R. W. Co., 405.
Black v. Wiebe, 75.
Bockfinger v. Murray, 260.
Bocz v. Spiller, 366.
Bowker and Richards, Re, 194.
Brown v. Spruce Creek Power Co., 143.


C.


Cameron v. Overend, 545.
Canadian Bank of Commerce v. Butler, 173.
Canadian Bank of Commerce v. Carbonneau, 262, 399.
Canadian Bank of Commerce v. McDonald, 271, 506.
Cann, Re, 206.
Carbonneau v. Latourneau, 273.
Carman, Village of, v. Fisher, 276.
Cartwright v. The King, 82, 103.
Cass v. McCutcheon, 435.
Caswell and Rural Municipality of South Norfolk, Re, 327.
Centre Star Mining Co. v. Rossland-Kootenay Mining Co., 313, 336.
Centre Star Mining Co. v. Rossland Miners' Union No. 38, 244.
Chan Dy Chea v. Alberta R. W. and Irrigation Co., 371.
Clement v. Faircloth Co., 524.
Colwill v. Johnson, 218.
Cooper v. Yorkshire Guarantee Co., 337.
Curle v. City of Brandon, 176.


D.


Dakota Lumber Co. v. Rinderknecht, 481.
Davies v. Canadian-American Coal and Coke Co., 55, 97.
Dickinson v. Robertson, 142.
Dodds v. Morrison, 164.
Doherty v. Vancouver Gas Co., 252.
Dreger v. Canadian Northern R. W. Co., 126.
Duggan v Canadian Pacific R. W. Co., 356, 570, 576.
Dundas v. Osmont, 363.
Dundass and Municipality of Chilliwack, Re, 94.


E.


Eggleston v. Canadian Pacific R. W. Co., 356, 570, 576.


F.


Ferris v. Canadian Northern R. W. Co., 177.
First National Bank of Minneapolis v. McLean, 538.


Digitized by Google

Fisher and Village of Carman, Re, 455.
Fonseca v. Lake of the Woods Milling Co., 553.
Fortin v. Pound, 333.

G.

Galley v. Galley, 155.
Gamble v. Spencer, 189.
Gibbins v. Metcalf, 139.
Gibson v. Coates, 556.
Gibson v. Drennan, 577.
Gilmour v. Simon, 417.
Gold Run Klondike Mining Co. v. Charbonneau, 264.
Gougeon v. Thompkins, 114.
Gourmany v. Manitoba Club, 175.
Graham v. Frank, 510.
Graves v. McDonald, 325.
Grey v. Stephens, 450.
Grierson v. Johnston, 83.

H.

Handy (Joshua) Machine Works v. Pace, 156.
Hardaker, Re, 161.
Harrod v. Watt, 216.
Harvey v. Silzer, 360.
Hickey v. Legresley, 546.
Hogan v. Baatz, 513.
Hogan v. Baatz and Taylor, 513.
Hogan v. Bactz, 393.
Hogan v. Bactz and Taylor, 393.
Howe v. Schroeder, 174.

I.

Imperial Bank of Canada v. Twyford, 157.
Ireland v. Andrew, 346, 575.

J.

Jackson v. Drake, 97.
Jobin-Marrin Co. v. Betts, 369.
Johannesson v. Galbraith, 445.
John Abell Co. v. Hornby, 3.
John Abell Co. v. Long, 24.
Johnson v. Appleton, 14.
Johnston v. Hurb, 565.
Joshua Handy Machine Works v. Pace, 156.

K.

Kennedy v. Joyce, 197.
Kerr v. Bowden, 28.
Kerr v. Brown, 379.
Kickbush v. Cawley, 18.
Klassen v. Wright, 158.
Knudson and Town of St. Boniface, Re, 281.
Krienke v. Mohr, 254.

L.

Ledieu v. Roediger, 515.
Lee v. Crow's Nest Pass Coal Co., 527.
Lequime v. Brown, 193.
Lewis and Phalen, Re, 36.
Lillie v. Thomas, 467.
Lilly, Re, 117.
Lisle v. De Lion, 274.

M.

Macarthur v. Hastings, 285.
McArthur v. McArthur, 1.
McAuley v. Dick, 381.
McCallum v. Williams, 257.
McCaul v. Christie, 332.
McFee v. Young, 383.
McGregor v. Withers, 429.
McIlvride v. Mills, 229.
McKenzie v. Kayler, 290.
McKinnon v. Minatty, 272.
McLenaghan v. Hood, 422.
McNaughton Co. v. Hamel, 169.
McNichol v. Brucks, 478.
Maneer v. Sanford, 128.
Massey-Harris Co. v. Lowe, 213.
Massey-Harris Co. v. Mollond, 424.
Massey-Harris Co. v. Moore, 215.
Minuk v. White, 401.
Morgan v. British Yukon Co., 294.
Moyie Lumber and Milling Co. v. May, 152.
Murray v. Royal Ins. Co., 8.

N.

New Hamburg Manufacturing Co. v. Klotz, 471.
North American Transportation and Trading Co. v. Olsen, 518.

O.

Osment v. Blount, 497.

P.

Pacific Cold Storage Co. v. Troughton, 529.
Pearce v. Hart, 476.
Pease v. Johnston, 208.
Peck v. Sun Life Assurance Co. of Canada, 302.

Digitized by Google

Peirson v. Canada Permanent and Western Canada Mortgage Corporation, 99.
Penner v. Winkler, 403.
Perkins v. Jones, 41.
Perry v. Manitoba Milling Co., 541.
Plisson v. Diemert, 359.
Primeau v. Mouchelin, 434.
Primeau v. Pantel, 434.

Q.

Qu'Appelle Dominion Election, Re, 496.

R.

Racine v. McGinnity, 265.
Rex v. Austin, 571.
Rex v. Canadian Pacific R. W. Co., 89.
Rex v. Flynn, Re, 388.
Rex v. Hostyn, 113.
Rex v. King (Charles), 348, 576.
Rex v. Mah Kee, 37.
Rex v. Massey-Harris Co., 45.
Rex v. Nunn, 559.
Rex v. Osberg, 121.
Rex v. Pickering, 521.
Rex v. Preston, 17.
Rex v. Wasyl Kapij, 130.
Rex ex rel. Park v. Street, 87, 202.
Richards v. Williams, 9.
Ritchie v. Canadian Bank of Commerce, 499.
Rogers and Nunn, Re, 559.
Rogers v. Frechette, 190.
Ross Brothers Limited v. Pearson, 338, 575.
Russell v. McKerchar, 138.

S.

Savage v. Canadian Pacific R. W. Co., 441.
Scott v. Tasker, 199.
Sea, Re, 460.
Smith v. Galbraith, 227.
Smith v. Public Parks Board of Portage La Prairie, 237.
Spencer v. Drysdale, 6, 7.
Stearns v. Kimmell, 390.
Stephens v. Olson, 572.
Stimson v. Hamilton, 20.

T.

Tarry v. West Kootenay Power and Light Co., 186.
Thomas v. Clark, 512.
Tjerstrom, Re, 385.

V.

Vancouver, City of, v. British Columbia Telephone Co., 461.
Vulcan Iron Works Co. v. Leary, 453.

W.

Walker v. Robinson, 181.
Watkins, Re, 457.
Watson v. Moggey, 438.
Watts v. Hehsdoerfer, 105, 110.
Wilson v. Graham, 278.
Wilson v. Rannie, 397.
Winnipeg Land and Mortgage Corporation v. Witcher, 551.
Wright v. Battley, 563.

Y.

Young v. West Kootenay Shingle Co., 184.

Z.

Zacklynski v. Kerchinski, 32.

Digitized by Google

Digitized by Google

THE

# Western Law Reporter

VOL. I. TORONTO, FEBRUARY 1, 1905. No. 1.

## MANITOBA.

PERDUE, J. JANUARY 12TH, 1905.

CHAMBERS.

### McARTHUR v. McARTHUR.

*Alimony—Interim Order—Time for Applying—Pleadings—Time for Commencement of Allowance—Disbursements—De Facto Marriage—Consideration of Merits—Discretion—Appeal.*

Appeal by defendant from an order of the referee directing the payment of alimony from the commencement of the action, and interim disbursements.

T. G. Mathers, for defendant.

T. R. Ferguson, for plaintiff.

PERDUE, J.—The first objection taken by defendant is, that the motion was premature, the statement of claim having been amended on the same day upon which the motion was made.

It was contended that under Rule 433 no application for interim alimony should be made until the time for delivering the statement of defence to the amended statement of claim had elapsed. I do not give effect to this objection, as I think the meaning of the Rule is that the application may be made as soon as a defence is filed, or the time for filing one to the original statement of claim has elapsed.

The second objection is, that interim alimony was allowed from the commencement of the action, not from the date of the order.



Digitized by Google

The statement of claim called for interim alimony, but mentioned no specific sum. Under the former equity practice the plaintiff had to indorse on the office copy of the bill served a demand for a certain amount for each week or month as interim alimony, giving the place where the same might be paid.

If this notice or demand was not indorsed, the alimony was granted only from the date of the order: Peterson v. Peterson, 6 P. R. 150. The same practice still prevails in Ontario, the interim alimony being demanded with the writ.

Our Rule 601 plainly contemplates that a demand for a specific sum by way of interim alimony should be made in the statement of claim, so that the defendant might have the option of submitting to pay the amount demanded and avoid the taking out of an order.

As no specific sum was claimed in the present case, the defendant could not have availed himself of the provisions of the Rule. The order of the referee should, therefore, be modified by directing that the interim alimony should run only from the date of the order.

The third objection is, that there was no evidence before the referee as to the amount of disbursements made by plaintiff's solicitor.

I will not, at present, give weight to this objection, but in any future application the amount already ordered must be taken into account and the items of disbursement made hereafter clearly proven.

The fourth objection is, that this is not a case in which interim alimony should be allowed. It was contended that the merits can be looked into to ascertain if there is a fair and reasonable probability of the plaintiff succeeding. McPherson v. McPherson, 2 Ch. Ch. 222, was cited in support of this. I think the true rule is, that where a de facto marriage has been proved, interim alimony should be allowed without going into the merits of the defence. Even where a decree nisi had been made at the suit of the husband to set aside a marriage on the ground of nullity, alimony was granted by the Probate Division of the High Court of Justice in England, and this was upheld by the Court of Appeal: Foden v. Foden, [1894] P. 307.

In Ontario the Court has refused to consider the merits of the case on an application like the present; and that, even where the question of the adultery of the plaintiff has been raised: Campbell v. Campbell, 6 P. R. 128; see also Keith v. Keith, 7 P. R. 41.

Digitized by Google

The defence in this case sets up a most painful state of circumstances, but I do not think that I should, upon this application, go into the question as to whether the allegations are true or not, and into the legal effect of the matters alleged in case they are established.

The referee has exercised his discretion in granting interim alimony, and I shall not interfere with his order in that respect.

The costs are to be costs in the cause.

---

## MANITOBA.

PERDUE, J. JANUARY 18TH, 1905.

TRIAL.

### JOHN ABELL CO v. HORNBY.

*Estoppel—Charge on Land—Lien Memorandum—Representation as to Ownership — Subsequent Conduct — Extension of Time for Payment of Amount Charged—Conditional Sale of Goods—Lien for Price—Acceptance of Goods.*

Defendants ordered from plaintiffs an engine and separator, which were delivered, and promissory notes were given for the price; defendant Ellen Hornby also giving a lien on a quarter section of land as security to plaintiffs. Both defendants Charles Hornby sen. and his wife, defendant Ellen Hornby, stated to plaintiffs' agent that she was the owner of the land, and the lien was signed by Ellen Hornby in the presence of her husband, with his approval and at his request. The evidence shewed that at the time and down to the trial the land was standing in the name of Charles Hornby sen. Plaintiffs asked for payment of the amount due and for a declaration that they were entitled to a lien on the land, contending that Charles Hornby sen. was estopped from asserting that he was the owner thereof as against the lien.

Defendant Charles Hornby sen. set up that he actually resided with his family on the land in question and cultivated it, and claimed exemption under the Executions Act.

H. M. Howell, K.C., and T. G. Mathers, for plaintiff.

J. A. M. Aikins, K.C., and A. McLeod, for defendants.

Digitized by Google

PERDUE, J.—The defence set up as to delay in delivering the machinery, the non-delivery of parts, and the alleged failure of the machinery to do the work for which it was purchased, cannot, in my opinion, prevail.

The machinery was accepted by defendants, and notes given after its receipt; it was used by defendants for several seasons, without written or verbal complaint as to defects; payments were made on account and the notes given in settlement were renewed by defendants.

Considerable evidence was adduced as to the amount remaining due to plaintiffs and as to the credits to be allowed, but, after giving the matter careful attention, I am of opinion that the amount claimed by plaintiffs at the hearing, namely, $1,012.95, is correct.

The question as to whether plaintiffs are entitled to a lien on the land mentioned in the statement of claim is one in which I have found considerable difficulty in arriving at a conclusion. The machinery was sold under a written agreement, which provides that the purchase money is to be paid on delivery, or, in lieu thereof, notes to be given on approved security for the amounts, payable at the dates mentioned in the document. This agreement was signed by the five defendants, and on the back of it there was indorsed a statement which was signed by Charles Hornby sen. and his wife Ellen Hornby, stating that, "to obtain credit, as indicated in the within order, I hereby certify that I own in my own name and right" the land in question and personal property of the value of $1,000. I find that it was represented to plaintiffs' agents at the time the agreement or order was signed, and also when the notes were taken, both by Ellen Hornby and Charles Hornby sen., that she was the owner of the land, and that the husband owned the personal property. It now appears that the land at that time and down to the present was and is standing in the name of Charles Hornby sen.

When the machinery had been delivered at the Hornby farm, plaintiffs' agent called there to take settlement for it. The notes were then signed by defendants, and the agent called for a lien on the land as security for the notes. The agent states that Hornby sen. represented that his wife owned the land.

A lien on the land to secure the notes was then signed by Ellen Hornby as the owner of the land, and this was done in the presence of Charles Hornby sen., and on his representation that she was the owner. Relying upon what was told

Digitized by Google

him by the husband, the agent was satisfied with the lien signed by the wife, and did not insist, as he might have done, that the husband should also sign it.

The fact that Ellen Hornby was represented by her husband as being the owner of the land is borne out by the letters afterwards written by him in which she was several times spoken of as the actual owner.

It was argued on behalf of defendant Charles Hornby sen., that the lien was given after the delivery of the machinery and the settlement for the same by the giving of promissory notes, and that there was no consideration for the giving of the lien.

It was, therefore, argued that the position of the plaintiffs had not been changed by any representation made by Charles Hornby sen., with the intention that it should be acted upon by plaintiffs, and that the well known principle of estoppel laid down in Freeman v. Cooke, 2 Ex. 654, and other cases, was not applicable.

The intention of the agreement between the parties was that if the machinery was not paid for in cash, promissory notes either furnishing in themselves satisfactory security, or accompanied with security to the approval of plaintiffs, should be given. This I take to be the meaning of the expression, "notes on approved security." When the agent was closing the transaction and taking the promissory notes given in settlement, he demanded a lien on the land as a security in addition to the notes.

If the lien had been refused it was still open to plaintiffs to remove the machinery and refuse to carry the transaction through. The lien was given to satisfy the condition as to security required by plaintiffs, and therefore formed part of the consideration upon which the machinery was handed over to plaintiffs and left in their possession.

The agent stated that if he had known that the husband was the owner and not the wife, he would have got him to sign the lien.

I think that Charles Hornby sen. made the representation that his wife owned the land, meaning that plaintiffs' agent should act upon it and take the lien executed by her as the security required; that the agent did so act on this representation and receive the lien so executed by her as the security he required on behalf of the plaintiffs.

Renewal notes were subsequently given by defendants, and the original periods of credit considerably extended.

Digitized by Google

During this time it was still represented to plaintiffs by Charles Hornby sen. that his wife was the owner of the land.

It may well be that this conduct on his part, subsequent to the first representation as to the ownership of the land, had the effect of lulling plaintiffs into the belief that the security was valid and sufficient, and that in this belief the extension of time was given. See Ewart on Estoppel, p. 40.

For the above reasons I think that Charles Hornby sen. is estopped from denying that the land in question is his wife's, and from claiming it as land owned and occupied by him and exempt from proceedings under a registered judgment.

There will be judgment for plaintiffs against all the defendants for $1,012.95 and costs of suit. There will also be a declaration that the lien in question forms a valid charge upon the land mentioned in the statement of claim to the extent of the sum above mentioned and the costs of this suit, subject however to any prior incumbrances existing on the land. There will be an order for payment of the above amount with subsequent interest and costs within three months, and in default, that the land be sold, subject to prior incumbrances, if any, under the direction of the Master of this Court. The proceeds of the sale are to be applied, first, in paying plaintiffs' claim; second, in paying any subsequent incumbrances; and the balance is to be paid to Charles Hornby sen.

---

## BRITISH COLUMBIA.

### (VANCOUVER.)

MORRISON, J. JANUARY 4TH, 1905.

CHAMBERS.

## SPENCER v. DRYSDALE.

*Security for Costs—Amount—Interlocutory Appeal to Full Court—Consolidation of Appeals from Several Orders.*

Motion by plaintiff for security for costs of appeal where several appeals from various injunction orders were consolidated by order of the full Court.

Digitized by Google

Wade, K.C., for plaintiff, asked for substantial security owing to the numerous law points involved and the fact of their being practically four appeals.

C. B. Macneill, for defendants.

MORRISON, J., made an order allowing only the usual security, holding that there was nothing unusual in the application to take it out of the ordinary practice, by which security in $150 is allowed in all interlocutory appeals.

---

## BRITISH COLUMBIA.

### (VANCOUVER.)

MORRISON, J. JANUARY 4TH, 1905.

CHAMBERS.

## SPENCER v. DRYSDALE.

*Evidence—Foreign Commission—Application for—Affidavit in Support—Purpose of Evidence Sought.*

Application by plaintiff for a commission to examine witnesses in Quebec. The affidavit of plaintiff's solicitor filed in support, among other things, stated that defendant Drysdale had refused to answer certain questions on his examination for discovery, setting forth the questions. It did not specifically state that the commission was for the purpose of eliciting this information.

Wade, K.C., for plaintiff.

C. B. Macneill, for defendants, took the objection that the affidavit in support of the motion did not shew the issues on which witnesses sought to be examined could give evidence, citing the Annual Practice, 1905, p. 512.

MORRISON, J., overruled the objection and granted the order.

Digitized by Google

## BRITISH COLUMBIA.

### (VANCOUVER.)

MORRISON, J. JANUARY 6TH, 1905.

CHAMBERS.

### MURRAY v. ROYAL INS. CO.

*Solicitor—Lien on Fund in Court—Charging Order—Priority over Garnishing Orders—Costs—Taxation.*

Plaintiff recovered a verdict for $3,000 damages against defendants in an action upon a fire insurance policy.

Defendants appealed to the full Court, and the damages were reduced to $1,000, plaintiff accepting that amount, and no order for costs being made.

Plaintiff's solicitor in the action now moved for an order charging his costs as between solicitor and client on moneys paid into Court on the judgment of the full Court.

The British Columbia Trust Company were mortgagees, and claimed the moneys under an assignment of the insurance policy. They had also garnished the money in the hands of defendants; so also had the Union Bank and a firm of solicitors.

D. G. McDonell, for the plaintiff's solicitor, argued that the solicitor's lien took precedence over all garnishing orders; that, as between the British Columbia Trust Company and plaintiff, the company could not now set up a right under their assignment of the policy, having sat by and allowed him to recover from the defendants; that the damages were for more than mere insurance, and included loss of profits in business and for negligence.

A. McEvoy, for the trust company.

W. J. Bowser, K.C., for the Union Bank, garnishing creditors.

W. M. Griffin, for solicitors, garnishing creditors.

C. B. Macneill, for the defendants.

MORRISON, J., held that the solicitor's lien took priority over the garnishing orders, and granted the charging order.

Costs allowed to all parties represented, the Judge holding that any solicitor served with any kind of a notice or

Digitized by Google

Chambers summons in any case being on the list, is, as a general rule, entitled to costs for his attendance, as he encounters an element of risk by non-attendance.

In this case, however, he did not feel inclined to allow costs for the attendance of defendants, as the charging order, if granted, could not in any way prejudice defendants, who had paid the amount into Court, and he would not have done so if there had not been an error in the summons served upon the solicitor for the defendants, the amount to be charged being stated as $1,000, instead of $918, which was the correct amount paid into Court by defendants. It was directed that the solicitors for the trust company, the Union Bank, and the garnishing solicitors, might attend on the taxation of plaintiff's solicitor's costs to protect their clients' interests in this regard.

---

## BRITISH COLUMBIA.

### (VICTORIA.)

JANUARY 11TH, 1905.

FULL COURT.

## RICHARDS v. WILLIAMS.

*Judgment — Action to Set aside — Pleading — Failure to Allege Fraud—Allegation that Writ not Served—Allegation that Debt on which Judgment Recovered Satisfied—Relief in Original Action — Summary Dismissal of Action.*

Appeal by plaintiff from order of DRAKE, J., dismissing plaintiff's action against Robert T. Williams and Joseph Sears, on the ground that no cause of action was disclosed in the statement of claim, which (omitting immaterial statements) was as follows:—

3. On or about 27th May, 1893, defendants, with one Henry Saunders, indorsed for the accommodation of plaintiff a certain promissory note for the sum of $3,000, bearing interest at the rate of 12 per cent. per annum.

4. At the time of such indorsement plaintiff gave security to the indorsers, in the event of their being called upon to pay the promissory note, such security being by way of

Digitized by Google

life insurance policies upon the life of plaintiff, which policies were assigned by plaintiff in writing to defendants and Henry Saunders.

5. Shortly after the making and before maturity of the note so indorsed, the plaintiff, being then unable to retire the note, so informed the indorsees and requested them to realize on the then surrender value of the policies of insurance, and pay the note.

5*a*. The then surrender values of the policies were nearly equal to the amount of the note.

6. The indorsers of the note other than defendant Robert T. Williams were agreeable to such proposal, but defendant Robert T. Williams, by arrangement with plaintiff, agreed to take over the policies absolutely himself, at their then surrender value, as an investment in his, defendant Robert T. Williams's behalf, and to pay the note and relieve plaintiff of any responsibility thereon up to the amount of such surrender value.

7. Defendant Robert T. Williams did not pay the note as agreed, and subsequently became embarrassed financially, and was unable to carry the policies, and they were disposed of by or on behalf of defendant Robert T. Williams at a sum less than the surrender value of the same at the time of the maturity of the note.

8. Thereafter defendant Robert T. Williams, knowing full well that plaintiff was embarrassed financially, absent from the Province, and unable to protect himself in the premises, falsely pretended that plaintiff was indebted on a balance due on account of the note, and, together with defendant Joseph Sears, procured a judgment in that behalf in the Supreme Court of British Columbia.

9. Defendants also procured the arrest of plaintiff upon capias proceedings, which said proceedings were subsequently set aside by a Judge of the Supreme Court of British Columbia, and owing to the arrest plaintiff suffered damage.

10. Plaintiff believes and charges the fact to be that no service of the writ of summons in the said action was ever made upon him, and that the said liability of plaintiff to defendants and co-indorser was satisfied and discharged either prior or subsequent to the institution of said action, as defendants well knew at the time.

The plaintiff claims:

1. A declaration that the said judgment should be set aside.

2. Alternatively a declaration that the said judgment has been satisfied.

Digitized by Google

3. A declaration that the defendant Robert T. Williams has received for and on account of the original policies aforesaid a sum equal to their surrender value at the time of the maturity of the note.

4. An account of all moneys paid out or received by defendant in connection with said note and insurance policies.

5. Costs of this action, and such further and other relief as the nature of the case may require.

The judgment referred to in the statement of claim was signed on 29th January, 1895, in default of appearance by defendant, and in the affidavit of service the deputy sheriff swore that he served the writ on Richards on 21st January, 1895.

On 9th December, 1903, plaintiff commenced an action to have the judgment against him set aside. In the indorsement on the writ fraud on the part of defendants was not charged, and before the delivery of a statement of claim that action was dismissed, on an application to HUNTER, C.J., on the ground that the relief sought was properly the subject of an application in the original action.

Plaintiff then commenced this present action, the claim indorsed on the writ being to have the judgment set aside on the ground that it was obtained by fraud.

The appeal was argued at Victoria on 11th January, 1905, before HUNTER, C.J., MARTIN and MORRISON, JJ.

W. J. Taylor, K.C., and H. D. Twigg, for appellant.

W. E. Oliver, for respondents.

HUNTER, C.J.—I think the order is right, and that the appeal ought to be dismissed.

The statement of claim develops two complaints, according to Mr. Taylor (I say according to Mr. Taylor, because I do not see that the allegations are sufficient), that is to say, the complaint that the judgment in question was recovered by fraud, and, in the alternative, that the debt is satisfied.

As to the latter complaint, there is no doubt whatever that a full and sufficient remedy could have been given on a summary application in the original action. There is no doubt the ground could have been taken that the judgment has been satisfied, or certain transactions had in respect of the judgment that would amount to satisfaction. The only ground upon which this action can be supported is that the judgment was recovered by fraud.

It is a well settled rule that allegations of fraud must be positively and distinctly stated so that there is no ambiguity

Digitized by Google

or liability of misunderstanding; they must not only be precise, but the material facts upon which plaintiff relies as constituting the fraund must be clearly set forth.

Now the only paragraph in this statement of claim that I can see bearing upon the question of fraud is paragraph 10, in which it is stated that "plaintiff believes and charges the fact to be that no service of the writ of summons in the said action was ever made upon him, and that the said liability of the plaintiff to defendants and co-indorser was satisfied and discharged either prior or subsequent to the institution of said action, as defendants well knew at the time." Now, that allegation, as it stands, is ambiguous, because it is impossible to say whether the expression "as the defendants well knew at the time" is intended to apply to the first or second statement in the paragraph, or to both. To say that the mere fact of no service of the writ of summons—or any other proceeding in the action, for that matter—is sufficient to sustain an allegation of fraud, is absurd. The gist of the action is that the judgment has been recovered by fraud, and not that some particular step taken in the suit was irregular or has not been taken at all. It is quite consistent with the statement that there was no service of the writ, or that it was served on Sunday, or that there was insufficient or irregular service, as, for instance, by leaving the document in the room where defendant was at the time and not handing it to him personally, or something of that sort. And it is evident that, for anything stated in that paragraph, all irregularities, if there were any, might have been waived and that the present plaintiff might have allowed the judgment to go without objection.

A significant fact, I think, also, is that the prayer in the statement of claim does not ask definitely and positively that there should be a declaration that the judgment was recovered by fraud. And that to my mind points strongly to the fact that the allegations in paragraph 10 were not intended to go so far as to charge fraud in the recovery of the judgment, but were left open to a double interpretation.

In my opinion, there is no class of action in which the rules relating to the allegations of fraud ought to be more rigidly enforced than in an action of this character.

MARTIN, J.—I am of the opinion also that this appeal should be dismissed, and the judgment of the lower Court affirmed, but on a somewhat different ground from that mentioned by my Lord, viz.: I find that the positive averment of the recovery of judgment against this defendant is wanting, though it is the averment upon which the whole case

Digitized by Google

turns; because, unless the judgment was recovered against this particular person, then of course the charge of fraud is at an end.

And, at first, I may say, that I also took the view expressed by my Lord in regard to paragraph 10, that in any event it does not set up a charge of fraud properly because of the ambiguities suggested by the alternative statement in the latter part of the paragraph, "either prior or subsequent to the institution of said action." However, on further consideration, I am of opinion that it may be that the words "as defendants well knew at the time" apply to the former part of the paragraph as well as the latter. But I must say that I realize that it is quite open to others to take a contrary view to mine on that matter, for the whole pleading is slovenly.

Further, it strikes me as being a remarkable thing, that, though the paragraph says, taking it at its best, that there was no service of the writ, nevertheless it does not state what always was necessary to be stated under the former practice, and is under the present one, when an application is made in Chambers to set aside a judgment on this ground (and I see by reference to Archbold's Practice, that the application should be made in Chambers); you must not only shew that you were not served with the writ, but that it did not come to your knowledge or notice, otherwise the irregularity will be deemed to have been waived. Now there is no averment in that paragraph other than that the writ was not served, and it is quite consistent with what is alleged that, even if it were not served, defendant had notice thereof, which is tantamount to the same thing in law, and therefore there would be no fraud, and the judgment should stand. In my opinion, in such cases as the present, this averment must always be made, for it really is the whole gist of the allegation, because, if there was notice, then there was also waiver of actual service.

MORRISON, J.—I regret that I cannot read paragraph 10 in the way in which the majority of the Court seem to read it. I think the matter savours of fraud, and coming down to paragraph 10, that allegation, it strikes me, is specific. I think there is a sufficient cause of action shewn and that the appeal should be allowed with costs.

Appeal dismissed; MORRISON, J., dissenting.

Digitized by Google

## BRITISH COLUMBIA.

### (VICTORIA.)

JANUARY 13TH, 1905.

FULL COURT.

## JOHNSON v. APPLETON.

*Principal and Agent—Agent's Commission on Sale of Land —Question of Fact—Appeal.*

Appeal by plaintiff to the full Court from the following judgment of HARRISON, Co.J., in the County Court of Victoria.

Plaintiff, who is a house and land agent, sues defendant for $157.50, being commission at 5 per cent. on $3.150, the sum for which defendant sold his house and lot.

The commission claimed is the usual agent's charge or commission where such agent has effected a sale of real estate.

Plaintiff did not sell defendant's property, but claims full commission in the following circumstances.

Plaintiff had been defendant's agent for the collection of rents of the property in question for some 11 or 12 years prior to defendant's selling it.

Plaintiff during that time was also authorized by defendant to sell, and if he effected a sale was to receive 5 per cent. commission on the price at which it might be sold.

Though he did not effect a sale, plaintiff claims that through his efforts one Rowe, who in 1903 became tenant of the property for a year, subsequently purchased it from defendant at the price of $3,150.

Mr. Rowe was called on behalf of plaintiff, but he does not bear out plaintiff's statement that on becoming a tenant, he, after the property had been offered for sale to him by plaintiff, told plaintiff he would "more than likely" purchase it later on during the tenancy.

On the contrary Mr. Rowe swears that he had no intention on renting the place of purchasing it. His affairs were too unsettled to purchase, nor did he say anything to plaintiff about purchasing it.

I find that defendant, not being able to effect a sale through plaintiff, in August, 1903, told him he was dissatisfied, and that he was going to put the property in other agents' hands for sale; that his price was $3,000 net, and whoever sold it was to look for remuneration to what, if anything, they could get a purchaser to pay above that sum.

Digitized by Google

I find that defendant did put the property in other agent's hands for sale, among them Mr. Brown, on the terms last mentioned. Stress was laid by plaintiff on his version of the conversation with Mr. Rowe previous to Rowe's tenancy. He also asserts that he was handling the property all along on the understanding that if it was sold he was to get 5 per cent. commission.

But I have arrived at the conclusion that Mr. Rowe's version is correct, and that plaintiff did not in any way conduce to the sale, let alone bring it about.

And I think that plaintiff's statement that if he found a purchaser at the price of $3,000 he was to get no commission bears out defendant's statement that the agent who sold was to look for remuneration or commission to whatever was obtained for defendant above $3,000.

As a matter of fact, however, Mr. Rowe was not the purchaser of the property. It was purchased by Mrs. Rowe in May, 1904, and she purchased not through plaintiff, but through Mr. Rowe and Mr. Brown, who each received $75 for their trouble.

She paid him $3,150, and defendant when he gets the money will receive $3,000 net.

In the circumstances I do not see how plaintiff is entitled to any commission or remuneration in respect of the sale.

Judgment for defendant with costs.

In addition to the facts stated in the above judgment, it appeared that before defendant placed the property in other agents' hand for sale, plaintiff told him that he had offered it to Rowe. On 4th August, 1904, Brown wrote to defendant as follows:—

"Re your premises Michigan St.

"I have been instructed by the Rev'd Rowe to make you the following offer of purchase.

| | | |
|---|---|---|
| Price ..... | | $3,150. |
| Cash on acceptance ..... | $ 350 | |
| Cash on Aug. 15th or Oct. 15th.. | 300 | |
| | $ 650 | |
| Mortgage at 5 per cent. ..... | 2,500 | |
| | | $3,150 |

Mortgage reduceable $250 per year.
Interest payable quarterly.
To insure against fire for $1,500."

Digitized by Google

The appeal was heard at Victoria on 13th January, 1905, before HUNTER, C.J., MARTIN and MORRISON, JJ.

Frank Higgins, for appellant.

J. H. Lawson jr., for respondent.

HUNTER, C.J.—I am of the opinion that the appeal should be dismissed. Speaking for myself, I think it is very clear that in this appeal there is no question of law involved at all; it is entirely a question of fact. The principles governing the law with respect to agents' commission with respect to land sales are well understood, and difficulty only arises in applying the law to the facts of the particular case. As far as I can see, in this case the question is a very simple one. The owner of the property instructed the agent in August, 1903, that he wished to receive $3,000 net for his property. Some time in the spring of 1904, Mr. Rowe became a tenant. It is true that the agent had several interviews with Mr. Rowe for the purpose of leading him to become a purchaser of the property, the price named by him to Mr. Rowe being $3,150; he, of course, understanding perfectly well from the owner that in order to make a profit for himself he would have to secure for the owner more than the sum of $3,000. It appears that the owner got somewhat impatient at the failure of the agent to dispose of the property, and notified him that he was going to put the property in another agent's hands, at the same time not withdrawing it from his own. He clearly notified the agent Johnson, according to the evidence, that he intended to take the $3,000 net from any person who offered it to him, and that he was going to put the property in the hands of other persons for sale. And he listed the property on the same terms with other agents, according to the evidence. Another agent, Brown, did effect a sale with Mr. Rowe as purchaser. But Mr. Rowe testifies, and the learned Judge so finds, that all that Appleton received was $3,000, that anything over and above that, which he paid, he paid to the agent Brown. Now it seems to me quite plain that Appleton has not deviated one iota from the understanding or arrangement he had with Johnson. He notified him that he intended to accept $3,000 net; and that is what he did, and, therefore, in the absence of collusion between Mr. Rowe and Mr. Appleton to defeat plaintiff of his commission, of which there is no suggestion, there is no cause of action. Even, however, if it were not clear, I should think that, as the appeal involves only a question of fact, it is impossible to succeed, having regard to the ordinary principles governing appeals to this Court. The appellant, when the question is one of fact, must satisfy the

Digitized by Google

Court of Appeal that the trial Judge is clearly wrong. In this case, after perusal of the memoranda of the County Court Judge, I fail to see that he was wrong in any respect. I might also add that where the amount involved is small, in this case $150, and where the question is entirely one of fact, and where there has been no shorthand reporter to report the proceedings in the case below, an appeal must, in the great majority of cases, necessarily be fruitless.

MARTIN, J.—I need only add that on the special facts of this case, as found by the trial Judge, I find myself unable to say that the decision is wrong. I may say that I appreciate the forcible manner in which Mr. Higgins has presented the case for his client in this matter. But after due consderation I fail to see that the judgment should be set aside.

MORRISON, J.—I have had all through the case some misgivings as to whether the salient parts of the evidence have all been noted by the learned Judge. Of course it is quite clear that a Judge has very difficult work to follow the points of the case and at the same time take down satisfactory notes of the evidence. There are some differences between the findings of the learned Judge and the evidence as taken by him, which at first inclined me to think that there was sufficient ground for a new trial. But having regard to the smallness of the amount, and the conclusions of my learned brethren, I have no hesitation in agreeing with them.

---

## BRITISH COLUMBIA.

### (VANCOUVER.)

HENDERSON, LOC.J. JANUARY 18TH, 1905.

TRIAL.

## REX v. PRESTON.

*Criminal Law—Speedy Trial—Election—Nature of Offence —Warrant of Commitment—Depositions—Assault or Attempt to Commit Rape.*

The warrant of commitment charged that the accused "did unlawfully assault with intent to carnally know;" but the recognizances by which the witnesses were bound over to appear at the trial stated that they were to give evidence on a charge of an "attempt to commit rape."



Digitized by Google

J. Martin, K.C., for accused, stated that he wished to make election for speedy trial.

A. B. Pottenger, for the Crown, objected that the charge was one of "attempting to commit rape," and was not one in which a speedy trial could be had, and objected to the election being made. He contended that the offence as set forth in the warrant of commitment described that offence, and further that it was the intention of the Crown to indict the accused on the charge of "attempt to commit rape."

Martin, in reply, contended that the warrant of commitment clearly charged an offence under sec. 263 of the Code. It did not charge an offence under sec. 268. If such a charge had been intended to be laid by the Crown, it should have been described in specific language; to describe an offence under sec. 268 the word "attempt" must be used. He argued that the accused was entitled to make the election, as it was a statutory right, and was therefore peremptory.

HENDERSON, Co.J., after having examined the depositions, said that he was not prepared to say that the depositions would not support a charge of an "attempt to commit rape," and he thought that the charge as set forth in the warrant of commitment was capable of either construction, and, in the circumstances, thought that if the Crown was willing to assume the responsibility of laying the more serious charge, he should not stand in the way.

In an unreported case IRVING, J. (sitting as local Judge having criminal jurisdiction), had refused to receive an election, after reading over the depositions.

The accused was therefore not permitted to elect a speedy trial.

---

## BRITISH COLUMBIA.

### (VANCOUVER.)

MORRISON, J. JANUARY 20TH, 1905.

CHAMBERS.

### KICKBUSH v. CAWLEY.

*Costs—Appeal to Full Court—Costs not Specifically Awarded—Statutory Provision.*

Appeal by plaintiff from the ruling of the registrar allow-

Digitized by Google

ing, on taxation, defendant's costs of an appeal by him from the judgment of the County Court of Chilliwack.

The action was for damages and for recovery of possession of demised premises under lease. A verdict was given for plaintiff for $10 damages and costs, and for the recovery of possession of the premises.

From this judgment defendant appealed to the Supreme Court, and the following order was made: "This Court doth order and adjudge that the said appeal be and the same is hereby allowed, and that the said judgment, so far as it ordered the defendant to give up possession of the premises in question and condemned him in the costs of the action, be and the same is hereby set aside.

"And this Court doth further order and adjudge that the plaintiff (respondent) do recover from the defendant (appellant) the sum of $10 damages, with costs on the appropriate County Court scale."

Joseph Martin, K.C., for plaintiff cited sub-sec. 7 of sec. 20 of the Supreme Court Act, statutes of British Columbia, 1903-4, ch. 13, to shew that in cases of forfeiture the Court has discretion as to costs. Nothing being stated in the order of the full Court as to costs, it must be taken that costs of the appeal were not allowed.

A. Dunbar Taylor, for defendant, cited sec. 100 of the Supreme Court Act, 1903-4, which reads as follows: "The costs of every appeal to the full Court, and of the trial and hearing of any cause and motion, shall follow the event." The statute having awarded the costs, it was unnecessary that the same should be mentioned in the order. The defendant had succeeded on the merits of the appeal, and should therefore be allowed his costs.

MORRISON, J., held that there was no reason for reversing the ruling of the registrar, the statute having fixed the matter of awarding costs of appeals.

Appeal dismissed with costs.

Digitized by Google

## NORTH-WEST TERRITORIES.

### (NORTHERN ALBERTA.)

SCOTT, J. JANUARY 7TH, 1905.

CHAMBERS.

### STIMSON v. HAMILTON.

*Attachment of Debts—Judgment in Action for Debt or Liquidated Demand—Claim for Proceeds of Sales by Agent—Claim for Goods Sold and Delivered—Rule 384.*

Application (heard at Edmonton) by defendant for payment out of Court to a solicitor of the moneys paid in by the garnishee, Delia Anderson; the solicitor being the assignee of defendant under an assignment date 11th October, 1902. The application was based upon the contention of defendant that the action was not one to recover a debt or liquidated demand, and that therefore the issue of a garnishee summons was not authorized.

C. de W. MacDonald, Edmonton, for applicant.

J. C. F. Bown, Edmonton, for plaintiff.

SCOTT, J.—Plaintiff's claim is for $911.60 due upon a covenant contained in a mortgage made by defendant to plaintiff.

The action was tried before me at Edmonton, and in my judgment I found that the mortgage was given to secure the amount of defendant's indebtedness to the North-West Cattle Co., of which plaintiff was then the manager; that the consideration for the mortgage was not an ascertained indebtedness of defendant to the company; that the accounts between them had not been settled or adjusted or the balance due by defendant settled or ascertained. I therefore directed a reference to the deputy clerk to ascertain and report the amount of defendant's indebtedness to the company at the date of the mortgage and the amounts paid by defendant to the company subsequent to that date, specifying in the case of each payment whether it was made on account of the indebtedness existing at that date, or on account of any subsequent indebtedness.

Digitized by Google

The deputy clerk by his report dated 22nd February, 1904, reported that defendant was indebted at the date of the mortgage in the sum of $450, and that nothing had been paid on account thereof.

The evidence shews that defendant was intrusted by the company from time to time with horses for the purpose of sale, and that he was to account to the company for the proceeds of all sales made by him, and that he was to receive a commission of 10 per cent. on all such sales. With the exception of charges against him for a saddle $30, harness $30, and bags $15, the amount due by him for the proceeds of sales of horses made by him, constituted his indebtedness to the company.

The fact that the action is one upon the covenant in the mortgage, instead of one brought by the company to recover the amount of the indebtedness secured by the mortgage, does not appear to me to be material as far as this application is concerned.

The whole question turns upon whether the company's claim for the proceeds of the sales of horses and for the goods charged for, is "debt or liquidated demand" within the meaning of Rule 384.

In the Encyclopædia of the Laws of England, vol. 4, p. 153, it is stated with reference to the action of debt that it was maintainable for the recovery of money due upon simple contract debts. . . . In the case of simple contract debts, certain concise forms of counts were generally used which were described as "common counts" or "common indebitatus counts;" those most frequently employed were for money payable (inter alia) for goods sold and delivered, for money received, for interest, etc. See also Bullen & Leake, Precedents in Pleading, 3rd ed., p. 36.

In Sheba Gold Mining Co. v. Trubshaw, [1892] 1 Q. B. 680, it was held that the words "debt or liquidated demand" in Order 3, Rule 6 (the Rule authorizing the special indorsement of writs of summons), are to be construed as applicable only to cases where the demand is a liquidated demand, and that (following Rodway v. Lucas, 10 Exch. 667), a claim for interest which is not payable under a contract or by statute, is an unliquidated demand.

In the Annual Practice, 1903, at p. 20, the following is stated: "Any definite sum of money recoverable at common law by express or implied agreement is within Rule 6; thus,

Digitized by Google

in general, money due on the common count, as had or received, or paid, or lent, or on account stated, is within the Rule, but not, it would seem, money claimed on a mere quantum meruit."

In Re Williams, 31 U. C. R. 143, it was held that a claim for flour, the product of wheat left by plaintiff with a miller to be manufactured into flour, was a liquidated demand, although the quantity of flour produced had not been ascertained.

The question of the construction to be placed upon the words referred to is exhaustively treated in an article on Summary Judgments in 39 Canada Law Journal 545, in which all the cases bearing upon the question are referred to.

In case the action to recover the amount of defendant's indebtedness had been brought by the company, the proper claim under the former system of pleading would have been on the common indebitatus counts for money payable by defendant, for money had and received by him for the use of the company, for interest upon same, and (as to the particular items I have referred to) for goods sold and delivered, or for goods bargained and sold. As to the claim for the proceeds of horses sold, there could of course be an inquiry either by the Judge or jury at the trial, or upon a reference to take accounts, as to the number of horses sold, the amounts received by the defendant in respect thereof, and the payments made on account either in money or goods (the evidence shews that payments both in money and goods were made on account), and it would then be merely a matter of computation to ascertain the amount of the indebtedness, but, notwithstanding that such inquiry might be necessary, the claim is nevertheless a liquidated demand.

Supposing that the claim had been for $100, the proceeds received by the defendant upon the sale of one horse, that would undoubtedly be a liquidated demand. Would it cease to be such if the defendant disputed that he had received that sum or any sum, or claimed that he had paid the amount or a portion of it? I think not; and yet, in case of any such dispute, there would have to be an inquiry to ascertain the amount plaintiff was entitled to.

I cannot draw any distinction between such a claim and the claim in this action, which is for the proceeds of the sale of a number of horses, less a fixed and ascertained deduction for commission, and in which, in consequence of a

Digitized by Google

dispute, an inquiry became necessary to ascertain the amounts received by defendant and the amounts paid by him on account.

Roulett v. Hill, [1892] 1 Ch. 277, and Lynde v. Wathman, [1895] 2 Q. B., which were cited by counsel for defendant, do not appear to me to favour his contention.

In the first mentioned case a mortgagee brought an action against the mortgagor for foreclosure, and obtained the appointment of a receiver of the rents of the mortgaged premises. He then brought a second action against the mortgagor, in which he claimed by special indorsement the interest which had accrued on the mortgage, less certain rents which had come to the hands of the receiver. So far as I can gather from the language used in the judgment, it was held on an application for summary judgment under Order 14 that the order should not be made, 1st because the relief claimed could be obtained in the first action, and 2nd because, by reason of the receipt of rent by the receiver, the amount was not a liquidated sum within the meaning of Order 3, Rule 6.

In the latter case the mortgagee in an action against the mortgagor claimed by special indorsement the principal and interest due on the mortgage. An application for judgment under Rule 14 was refused, merely because there was a plausible dispute as to the amount which plaintiff was entitled to recover. Defendant shewed upon the application that a receiver had previously been appointed for the rents, but Lord Esher, M.R., expressed the view that that fact should not prevent plaintiff indorsing his writ under Order 3, Rule 6. Kay, L.J., expressed the same view, and, in referring to the judgment in the former case, states that it does express the contrary view.

I gather from the latter case that, though there may be a dispute between the parties as to the balance due, it may still be a liquidated demand within Order 3, Rule 6.

For the reasons I have given I hold that plaintiff's claim is a liquidated demand within the meaning of Rule 384.

The effect of my holding otherwise would be in my view to give to that Rule a construction much more restrictive than the legislature contemplated.

The application will be dismissed with costs.

Digitized by Google

## NORTH-WEST TERRITORIES.

### (EASTERN ASSINIBOIA.)

WETMORE, J. JANUARY 7TH, 1905.

TRIAL.

### JOHN ABELL CO. v. LONG.

*Sale of Goods—Action for Price—Warranty—Defect in Article—Contract—Conditions as to Return—Compliance with—Authority of Agent of Vendor — Waiver — Notice—Costs—Witness Fees.*

Action to recover the price of a machine, tried at Carlyle, Assiniboia.

E. L. Elwood, Moosomin, and A. M. Matheson, Arcola, for plaintiffs.

J. T. Brown, Moosomin, and Williams, for defendant.

WETMORE, J.—The following are the facts in this case, as I find them. On 2nd September defendant ordered, through Lort Williamson, plaintiffs' agent at Carlyle, a "Maple Bay Blower." The order was in writing and contained the following clause: "The above mechinery is warranted, with proper usage, to do as good work, and to be of as good materials and as durable with proper care, as any of the same class made in Canada. If the above machine will not bear the above warranty, after a trial of one day, written notice shall be given to the company, and the agent of whom purchased, stating wherein it fails to satisfy the warranty, and reasonable time shall be given the company to send a competent person to remedy the difficulty, the purchaser rendering necessary and friendly assistance. If the machinery cannot be made to fill the warranty, it is to be immediately returned by the purchaser to the place where received, free of charge, and another substituted therefor which shall fill the warranty, or the money and notes returned. Continued possession shall be evidence of satisfaction. When at the request of the purchaser a man is sent to operate the above machinery, which is found to have been carelessly or ignorantly handled, to its injury in doing good work, we putting same in working order again, the expense incurred by the company shall be paid by said purchaser."

This machine was received by defendant on 14th September, and was taken to the place where he was working his

Digitized by Google

separator, and was given a fair trial of one day. The machine worked most unsatisfactorily; in fact, in view of the character of the work, it was not reasonably suitable for the purpose for which it was sold.

Defendant on the evening of that same day, namely, 15th September, came to the office of Lort Williamson, plaintiffs' agent above named, and under defendant's dictation Williamson wrote a letter to plaintiffs in which he stated that the blower had been operated, that it failed to fulfil the warranty, and failed to be able to carry the straw out, was continually choking up all day, and was no earthly use to defendant, unless plaintiffs could send a man to operate it and put it in shape, and also that he would lay it off until they sent a man. This notice was signed by defendant in the presence of Williamson, and forwarded by mail to plaintiffs, who received it in due course.

Defendant took the machine to the premises where he was living, one Blough's, and left it there; putting the pulleys and parts which were likely to be affected with the weather under cover. There is no assertion that the machine was not properly cared for. Williamson was notified as to where the machine was placed, and some time afterwards, about three months or so, Hewitt, who was plaintiffs' travelling settlement agent and collecting agent, was also notified where the machine was placed. Plaintiffs never sent a person to remedy the difficulty.

This action is brought to recover the price of the machine, which, so far as the evidence discloses, still remains at Blough's place.

When defendant notified Williamson as to where the machine was, Williamson told him to leave it there until such time as it was wanted. That is not disputed. When defendant notified Hewitt where the machine was, he asked him what he would do with it; Hewitt replied, he did not know, but asked defendant if he would deliver it at any time it was wanted, and defendant told him that he would do so free of charge. The evidence also establishes that Hewitt instructed Williamson to sell the machine if he could get a chance. Now, all this is denied by Hewitt, but that Hewitt did make statements of the character which I have found is practically supported by the testimony of both defendant and Williamson, and I accept the testimony of these two men, so corroborative of each other, as against the unsupported testimony of Hewitt. It was urged on behalf of plaintiffs, in the first place, that defendant had not complied with the terms of the agreement of sale, because he had not, in writing, notified

Digitized by Google

Williamson, the agent through whom the machine was ordered, of its failure to do satisfactory work. I hold that, inasmuch as Williamson wrote the letter which plaintiffs received, at the dictation of defendant, and as it was signed in his presence by the defendant, that was sufficient notification in writing to Williamson to fill the terms of the agreement. The fact that the notice was not addressed to Williamson does not seem to me to take away the effect; and as a matter of fact Williamson had, therefore, notice in writing that the machine did not work satisfactorily.

It was also contended that the evidence did not establish that the machine worked unsatisfactorily through defects in the machine itself; that the engine was defective, or had not sufficient power to run the machine properly, or that the straw which was being threshed was damp and caused it to choke or clog. (Frequent choking or clogging was the defective work which the machine did, and which was complained of.) I am of opinion, however, that there was prima facie evidence to establish that the unsatisfactory work was caused by a defect in the blower. The uncontradicted evidence is that there was nothing wrong with the engine, it was sufficient to operate the separator, and the blower was operated from the separator, and the weight of evidence establishes that the grain was not in such a state of dampness as to cause the defective working; and I therefore find that the defective working was owing to some defect in the blower. The great storm, which plaintiffs seemed to feel caused the grain to become very wet that year, did not occur until after 15th September.

It was further urged that by defendant not returning the blower to the place where he received it, it must be held under the terms of the agreement that the blower gave satisfaction; that defendant, after waiting a reasonable time, and plaintiffs failing to send a competent person to remedy the defect, ought to have returned the blower to the place where he got it, and, not having done so, he has no defence to this action. Assuming that plaintiffs' contention is correct, that in ordinary circumstances, after waiting a reasonable time for an expert to come out, and his not coming, the defendant in order to escape liability for the price of the machine ought to have returned it to the place where he received it—a proposition which I very much doubt, because it may be that the clause in the agreement with respect to continued possession may have reference only to a possession continued after an expert had come out and remedied or attempted to remedy the defect—assuming, however, plaintiffs' contention to be

Digitized by Google

correct in ordinary circumstances, I am of opinion that plaintiffs by their agent waived the obligation on defendant, if any, in the circumstances, to return this machine, and the provision as to possession being evidence of satisfaction. As before stated, Williamson was promptly notified as to the defect in the machine and where the machine was, and in addition to that he was actually on the ground and saw the machine work, and saw it doing defective work. Now the agreement provides that notice that the machine worked defectively was to be given to Williamson. That provision must have been inserted there with some object, and the only object I can see is that Williamson might take action in view of the notice; I can see no other object in it. I cannot conceive that he was to receive notice, and then just be about as useful as a post after getting it. Now, Williamson, the man to whom notice was given, and who, defendant had in the circumstances a right to assume, had authority to act in view of getting such notice, directed defendant, upon being notified where the machine was, to leave it there until such time as it was wanted. And I may add that, in my opinion, defendant was justified in assuming that Williamson was a proper man to notify where the machine was lying; being the proper man to notify of the defect, he was the proper man to notify where the machine was, so that he might remedy that defect. And I hold, therefore, that notice to Williamson was notice to the company, and that his instructions to defendant to leave the machine at Blough's until it was wanted were within the scope of his authority, and were binding on the company. I am not so clear that Hewitt's instructions were within the scope of his authority.

In view of all these findings, both of law and fact, I am of opinion that plaintiffs are not entitled to recover, and therefore order judgment for defendant with costs.

In view of the delay occasioned by defendant's application to amend his pleadings, which delay would not have otherwise occurred, I direct that the clerk, on taxing defendant his costs, do not allow for attendance of his witnesses on Sunday 11th or Monday 12th December, unless any such witness resided at such a distance from Carlyle that it would have taken him Sunday to get home if the trial had terminated on Saturday; in which case he can allow any such witness for attendance on Sunday. And he will also tax to plaintiffs their costs for the attendance of the witness Hewitt on Monday, together with counsel fee of $25 to their advocate, which will be deducted from the costs taxed to defendant.

Digitized by Google

## NORTH-WEST TERRITORIES.

### (EASTERN ASSINIBOIA.)

WETMORE, J. JANUARY 7TH, 1905.

TRIAL.

### KERR v. BOWDEN.

*Covenant—Restraint of Trade—Breach—Engaging in Business—Carrying on Business — Evidence — Onus — Business Carried on in Name of another Person.*

Action for damages for breach of a covenant by defendants not to engage in the business of a butcher in the town of Arcola.

Trial at Carlyle.

J. T. Brown, Moosomin, and T. T. Grimmett, Arcola, for plaintiff.

E. L. Elwood, Moosomin, and A. M. Matheson, Arcola, for defendants.

WETMORE, J.—On or about 2nd December, 1903, and for some time previous thereto, defendant William Carter Bowden was carrying on the business of a butcher in the town of Arcola.

On 2nd December he and plaintiff and defendant George H. Bowden entered into an agreement, under their respective seals. . . . By this agreement William C. Bowden agreed to sell to plaintiff and plaintiff agreed to purchase the premises and property upon which this butcher business was carried on, and the goodwill of that business.

The evidence does not satisfy me that George Bowden was a partner in that business. I have arrived at the conclusion under the evidence that he was only a hired man employed by his father, the other defendant, in connection with it. However, when the agreement referred to was proposed, George Bowden was made a party to it in the manner I have referred to; I presume because he had been seen busily employed about the premises, and his connection with the business was not thoroughly understood by plaintiff.

In the agreement referred to William C. Bowden agreed not to engage in business in the town of Arcola as a butcher as long as plaintiff should remain in business in Arcola as a butcher, and George Bowden entered into a similar covenant

Digitized by Google

on his part. The expressed consideration for George's entering into this covenant was the payment of the sum of $1 to him. It was urged that this covenant was not binding on George, because the consideration as expressed was not adequate, and because he had no interest in the butcher business.

Neither one of these objections can prevail. George was made a party to this agreement by the instructions of plaintiff to his solicitor, and the consideration agreed to be paid by plaintiff to William C. Bowden was a sufficient consideration for George's entering into the agreement. I have the right to assume that if he had not done so, plaintiff would not have entered into the agreement, or possibly he would not have paid as much for the property and goodwill as he agreed to pay. The fact that the true consideration, or the whole consideration, was not expressed in the agreement does not prevent the true consideration being considered.

This action is brought against defendants for an alleged breach of the covenant referred to, not to engage in the business of a butcher; and the breach set forth in the pleadings, and I wish specifically to lay stress upon this fact, is that "the plaintiffs carried on business as butchers in the town of Arcola contrary to and in violation of their agreement." I wish this emphasized, because, if the alleged breach had followed in the language of the covenants, that these parties "engaged in business" as butchers, I might have reached a very different conclusion from that which I have reached.

The evidence satisfies me that, after entering into this agreement with plaintiff, defendant William C. Bowden erected a building in Arcola, and that he had it in his mind at the time he commenced the construction of it to be in some way or other interested in a butcher business therein. One part of this building was intended for a grocery shop, and there was a communication by a door between this grocery shop and the other part; and I cannot help but come to the conclusion that his intention was to surreptitiously carry on a butcher business under the assumed name of some other person, contrary to his covenant. He approached one Sanger with the evident intention of carrying that out, and apparently had come to an arrangement with him to do so. This arrangement, however, fell to the ground subsequently, but if it had been carried out I should have had no hesitation in holding that the business would have been the business of William Carter Bowden. But, as stated, it fell to the ground and was not carried out.

William E. Bowden, who is not a party to this action, but who is a son of William C. Bowden,

Digitized by Google

according to the testimony on behalf of defendants, without being approached by either one of defendants, and without any secret understanding between them, came in and made an arrangement with his father to rent this shop adjoining the grocery shop. An agreement of lease was drawn up between them leasing this shop, which I will call "the butcher shop," and a sign was put up over the building, "W. E. Bowden," the old sign of "W. C. Bowden" being used and altered for the purpose. And both defendants were engaged by him as employees at an agreed price for their services. I am asked by plaintiff to find that this alleged carrying on of the business by William E. Bowden was a sham, a pretext; that he was simply a figurehead, and the true persons who were carrying on the business and who owned it were defendants. I am free to admit that there are very many suspicious circumstances in connection with it. In the first place, we find that George Bowden, although he was said to be hired as an employee and manager of the business for $50 a month, is not paid yet in full, and what pay he is said to have got, amounting to about $50, was taken without keeping any account of it apparently, and we also find him taking meat out of this shop and using it in his family without charging himself for it; and we find that, although he was employed to be practically the manager of the business until William E. could dispose of his farm by leasing it, that he attended to his own business and his wife came in and looked after what he was to be paid for doing. There is no doubt that both these defendants took part in this business; William C. Bowden sold meats, went into the shop from time to time, and apparently took charge of it; and he used expressions which would seem to imply that he was doing the business. He purchased cattle for the business, and so did George; and they were otherwise busy and active in and about the business in general. I cannot, nevertheless, bring my mind to the conclusion, under the evidence, that they were carrying on business for themselves, and that the business was not really William E. Bowden's. The documentary evidence seems to point in the direction that it was William E. Bowden's. The fact that he has leased his farm for the purpose of enabling him to devote his time to the business points in the direction that the business is really his, and the fact that, between the time that he entered into the arrangement and the time that he leased his farm, he was not in a position to give his personal attention to the business, might reasonably account for the part that his father and brother George took in attending to it; and so far as the father is concerned that is rather more pointed by the fact that Bell, whom William E. had employed

Digitized by Google

in and about the business, had died shortly after he was so employed. I may say, however, that I am more than suspicious that William E. was indueed to enter into this business by the defendants. Now, the evidence does not satisfy me that this business was that of defendants. I must assume that it was William E.'s, because the onus of proof that it was defendants' is on plaintiff. This brings me to the question whether, under my findings, defendants have committed the breach of their covenants alleged in plaintiff's pleading; that defendants carried on the business. I am only called upon to determine whether there was a carrying on by defendants. I am not called upon to inquire whether they have engaged in the business.

This question, I think, is determined by Allen v Taylor, 39 L. J. Ch. 627. There defendant Taylor, who was a rag merchant carrying on business at Nottingham, sold his business to plaintiff, and entered into a covenant that he would not during a specified term carry on the trade of a rag dealer, either in his own name or that of any other person, in the town of Nottingham. Taylor then entered into an agreement with a third person, a rag merchant, of Nottingham, to act as his manager in the rag business for a specified period, and the action was brought in consequence of an alleged breach of the covenant. James, V.-C., in delivering judgment, stated that "the evidence went to prove that the defendant was acting merely as a servant and at a weekly salary, and there was no evidence that he was carrying on business either in his own name or that of any other person." "No doubt," he says, "the course pursued by the defendant might do the plaintiff the injury intended to be guarded against by the covenant, but the plaintiff should have guarded by his covenant against his thus acting." This authority bears out Mr. Elwood's contention that a person is not carrying on a business when he is managing for another, or when he is in the other's employ simply as a salesman or workman or the like, where the business is a trade and not a profession. I can nowhere find the authority of Allen v. Taylor overruled.

It must be borne in mind that this is a covenant in restraint of trade, and cannot by any liberal construction be extended in favour of the covenantee beyond what a strict construction of the language will permit.

Therefore, under my findings, and the authority cited, I am forced to the conclusion that defendants were not carrying on this business; and I must therefore dimiss this action with costs.

Digitized by Google

## NORTH-WEST TERRITORIES.

### (NORTHERN ALBERTA.)

JANUARY 18TH, 1905.

SUPREME COURT IN BANCO.

## ZACKLYNSKI v. KERCHINSKI.

*Church—Dispute as to Ownership of Land and Building—Rival Claimants—Difference in Tenets—Question of Fact—Onus—Appeal.*

Action by the Reverend Iwan Zacklynski, Pavlo Pasemko and Petro Melynk, trustees of the congregation of the Greek Catholic Church at Star, Alberta, and also as individuals as priest and members of the congregation, suing on behalf of themselves and all the other members and adherents of the congregation, against the Reverend Iwan Kerchinski, Michailo Poluskie, Iwan Pylypiw, and Michailo Melynk, to obtain a declaration of the plaintiffs' right to certain land and a church building erected thereon.

The action was tried by SCOTT, J., who gave judgment for plaintiffs.

Defendants appealed, and their appeal was heard at Calgary, by SIFTON, C.J., WETMORE, PRENDERGAST, and NEWLANDS, JJ.

O. M. Biggar, Edmonton, for defendants.

C. de W. MacDonald, Edmonton, for plaintiffs.

WETMORE, J.—The defendants' appeal from the judgment of my brother Scott in this case is practically based upon the grounds that he erred in his findings of fact, and drew conclusions of fact not warranted by the evidence in some instances, or by his findings in others. No question of law is raised, except possibly one that was advanced by counsel for defendants at the hearing of the appeal, which I will refer to later on. The question raised by the case is, whether a certain church erected on a parcel of land in what is known as the "Star Settlement," and the said parcel of land, should be held for the use of the adherents of what is known as the "Uniate Church," or, as designated by some, the "Greek Catholic Church," or for the use of the adherents of the "Russian Orthodox Church." The parties to the dispute and to the action are Galicians.

Digitized by Google

Defendants claim that "The Russian Orthodox Church" is entitled to use, and is sometimes known by, the name of "The Greek Catholic Church." The trial Judge refused to decide that question, and I will adopt the same course; it is not necessary to do so for the purposes of this case. It is quite sufficient to distinguish them by the names of "The Uniates," and "The Russian Orthodox Church." Plaintiffs are Uniates; defendants are adherents of the Russian Orthodox Church. That there are material differences in their creeds, and in one respect as to their church government is quite apparent. It is also clear that all the defendants except Kerchinski were at one time Uniates. The evidence is very voluminous and of a very conflicting character. I do not consider it necessary to analyze this testimony. It is sufficient to state that, after a careful perusal of it, and of the learned Judge's judgment, I am of opinion that his findings of fact were warranted by the evidence, and I am disposed to think that if I had been in his place my findings would have been of a similar character; but, whether they would or not, this is not a case where a court of appeal should, in view of the conflicting character of the testimony and of the conclusions of fact open to be inferred from it, interfere with the trial Judge's findings. It was urged at the hearing of the appeal by Mr. Biggar, of counsel for defendants, that the trial Judge ought to have found, in order to entitle plaintiffs to their judgment, that when the land in question was applied for and the construction of the church commenced it was the intention of the people interested to obtain the land and to erect the church on it for the use of the "Uniates." The learned Judge in the course of his judgment says: "I cannot avoid the conclusion from the evidence that from the time the erection of the church in question was begun it was intended to be and is a Uniate church, and that up to the time Father Kerchinski held his first service therein all the services held therein were those of that church, and were held in accordance with its rites and ceremonies."

He then proceeded to state that the evidence leaves it open to doubt whether there was such a wholesale secession from the "Uniate Church" at the first service held by Fathers Kamniff and Alexandroff (the Russian Orthodox priests), as contended for on behalf of the defendants, and that, "even if any of the members of the Star congregation did become members of the Orthodox Church at that time, their subsequent conduct shews that they afterwards returned to their original faith." "It is impossible for me to believe



Digitized by Google

that they could have attended the services of Fathers Dymytrow, Tymkiewiez, and Zacklynski, extending over a period of four years, and have remained during the whole of that period in ignorance of the fact that their services were those of the Uniate Church, and not of the Orthodox Church." Then he proceeds to point out, in addition to this, that while for a considerable period the Star congregation was without a priest of their own, and although Father Alexandroff had returned to the Wostok settlement, a short distance away, and held services there, none of the lay defendants, and, so far as appears by the evidence, "none of the other members of the Star congregation, attended any of the services." Since I have held that the trial Judge's findings were warranted by the evidence, I add to those findings the further facts that were clearly established by the evidence: that the congregation proceeded to cut the logs to build the church, accompanied by Father Dymytrow, a Uniate priest in charge at the time; that the cemetery, part of the land in question, was consecrated by Father Zacklynski, another Uniate priest; and that the letter of 1st April, 1900, to Father Zacklynski, inviting him to come and take charge of the congregation, and signed by all the lay defendants, stated "we are all Uniates near together" on ranges 20, 19, 18, 17, and 16, in townships 57, 56, 55, 54, and 53; and, in view of the testimony bearing directly on the question, I have very little difficulty in inferring and bringing my mind to the conclusion that in applying for the land in question and erecting the church upon it, the intention was to obtain the land and to erect the church for the use of the Uniate congregation.

In my opinion this appeal should be dismissed with costs.

PRENDERGAST and NEWLANDS, JJ., concurred.

SIFTON, C.J. (dissenting)—This case affects the title to legal sub-division 1, section 27, township 36, range 19 west of the 4th meridian, N.W.T.; and is a contest between two apparently rival religious denominations for the control of a church building erected upon said land. A very large amount of evidence has been taken as to the different creeds and distinguishing peculiarities of the two bodies, most of which, in my view of the case, is irrelevant to the issue. The spasmodic visits to the settlement and services therein of various priests, and the degree of attention paid to their respective services by various members of the congregation before or after the completion of the church, is apparently relied upon strongly by both parties to the action, much

Digitized by Google

more so than experience in a new country like this would warrant. Settlers in a remote district anywhere in this country, with no settled pastor of their own, will attend occasional religious services and give the most serious attention thereto without in any way believing that they are prejudicing their own religious views, and much more will a settlement of foreigners, knowing no English, attend services conducted in their own language, even if not in the identical form to which they have been accustomed. In arriving at a conclusion in this case, I have eliminated the clerical plaintiff and defendant, who disclaim any interest, and have considered simply the documentary evidence filed shewing title in defendants, how they got it, and for what purpose, and whether anything has happened since to change their position. I find that on 29th November, 1897, a permit was issued to two of the defendants and one other person by the government, to cut logs for the erection of a church building for the mission of "The Greek Orthodox Church," which logs were by defendants and others hauled and used in the erection of the church in question; that about this time defendants were elected trustees of the congregation, and ever afterwards took the active part in looking after the affairs of the church; that previous to 25th May, 1898, there had arisen a question as to the title to this land; and that in consequence of protest Bishop Grandin had, as shewn by letter of that date to the Department of the Interior, relinquished all claim thereto to defendants. And on 6th July, 1899, a certificate of title issued for said lands vesting same in defendants "in trust for the purposes of the congregation of the Greek Catholic Church at Limestone Lake," being the congregation which had elected the defendants trustees. No evidence has been adduced to satisfy me that the original congregation, or any considerable portion thereof, have ever expressed dissatisfaction at the action of their trustees. No trustees have ever been elected to take their places apparently, by adherents of either of the rival denominations, under any of the various names claimed for them in the evidence. And I might say that this question of various names appears to cloud the issue herein, and may possibly have caused the issue of certificate wrongly in first instance, as both of the denominations appear to be commonly referred to by laymen as Greek Catholics. With this, however, this action has nothing to do, the sole question being whether defendants are entitled to hold this land as against plaintiffs, upon whom lies the onus of proof, and I therefore hold that plaintiffs have failed to prove their case, and the appeal should be allowed.

Digitized by Google

## NORTH-WEST TERRITORIES.

### (NORTHERN ALBERTA.)

JANUARY 18TH, 1905.

SUPREME COURT IN BANCO.

## RE LEWIS AND PHALEN.

*Assessment and Taxes—Tax Sale—School Taxes—Confirmation of Sale—Time for Redemption—Extension—Terms.*

The school taxes on certain land being in arrear, the treasurer of the Shepard public school district, number 226 of the North-West Territories, under warrant from the chairman of the board of trustees for that district, sold the land by public auction, under the provisions of the School Ordinance, to one John Phalen for $60, on 21st December, 1900, to satisfy the arrears. The time for redemption expired on 21st December, 1901, and a transfer was made to Phalen by the treasurer of the school district on 8th January, 1902, and since that time Phalen had been in possession of the land.

The sale of the land was confirmed by an order of SIFTON, C.J., on 11th July, 1904.

The registered owner of the land, Jessie Frances Lewis, appealed from the order.

The appeal was heard at Calgary.

C. T. Jones, Calgary, for the appellant.

R. B. Bennett, Calgary, for Phalen, the respondent.

The judgment of the Court (WETMORE, SCOTT, PRENDERGAST, NEWLANDS, and HARVEY, JJ.), was delivered by

WETMORE, J.—In view of the decision of the Supreme Court of Canada in the "St. John School Case," on appeal from the judgment of this Court, the appeal in this matter must be allowed if the appellant complies with the terms of the order now about to be promulgated.

Order: that it be referred to the clerk of the Supreme Court of the North-West Territories for the judicial district of Northern Alberta, at Calgary, to ascertain the proper amount to be paid to redeem the land in question, as provided

Digitized by Google

in sec. 2 of ch. 12 of the Ordinances of 1901, and for that purpose that the said clerk shall take an account; and that the appellant Lewis do, within ten days after such amount has been ascertained and certified to by the clerk, pay to the advocates for the respondent Phalen the amount so ascertained and certified to.

And that the said advocates do thereupon forthwith give to the advocate for the appellant Lewis a receipt therefor, and that, upon such receipt duly verified by affidavit being filed with the registrar of the Court, this appeal be allowed, and the order of the Chief Justice appealed against set aside, and that the respondent pay the appellant costs of this appeal, and that the registrar do make an entry thereof.

In the event of such amount not being tendered to the advocates of the respondent within the ten days above specified, and that fact being established to the satisfaction of the registrar, that the appeal be disallowed and the order appealed against affirmed with costs of the appeal to the respondent, and that the registrar do make an entry thereof.

---

## NORTH-WEST TERRITORIES.

### (NORTHERN ALBERTA.)

JANUARY 18TH, 1905.

THE SUPREME COURT IN BANCO.

## REX v. MAH KEE.

*Criminal Law—Keeping Common Gaming House — Conviction — Evidence to Sustain—Keeping for Gain — Resort of Persons to House—Game of Chance.*

Appeal by defendant from his conviction by SIFTON, C.J., for keeping a common gaming house.

The appeal was heard at Calgary, by WETMORE, SCOTT, PRENDERGAST, NEWLANDS, and HARVEY, JJ.

O. M. Biggar, Edmonton, for appellant.

C. de W. MacDonald, Edmonton, for the Crown.

HARVEY, J.—The accused was convicted by the Chief Justice of keeping a common gaming house, under sec. 198 of the Criminal Code. At the close of the trial counsel for

Digitized by Google

the accused applied to have certain questions of law reserved for the opinion of this Court, on the ground, shortly stated, that there was no evidence of the commission of the offence charged. The application was refused, and the accused now appeals to this Court under sec. 744 of the Criminal Code as amended.

An examination of the evidence taken at the trial, a certified copy of which has been filed on this appeal, shews that the chief constable of the city of Edmonton stated that the accused had a building in which he carried on a laundry business; that the witness visited this place on the evening of 20th June; that a man was standing guard at the door; that the witness entered and found 6 or 8 Chinamen sitting around a table, on which were dice, dominoes, checkers, and cards. His evidence proceeds:

Q. What else did you see there?

A. They had some coins, there were some American silver dollars, Canadian one dollar bills, and quite a lot of small silver, each one having their own pot in front of them. The accused was holding a little tin box, it was a cigar box, which I supposed to be a bank, they seemed to be getting their chips from him. I stood for some 15 or 20 minutes watching the game, and the accused dealt out of this box.

Q. Did you ask what the game was?

A. Yes, sir, I asked the accused, and he said it was "Fan Tan."

Q. Well, did you see anything else to shew what the character of the game was?

A. Nothing more than seeing the accused at the head of the table, or I mean at the head of the game.

Q. Now about this pile of money that was in front of each player?

A. The accused was taking in his share.

Q. What do you mean by taking in his share?

A. The accused was taking in certain amounts of coin and pocketing it, and then dishing out more chips after each hand had been played.

Q. Now how many times in all did you visit that place do you remember?

A. Some three times, sir.

Q. Was this time on the 20th June, the first or second time?

A. It was the first time, I think.

Digitized by Google

Q. Now did you ever have any conversation with Mah Kee between this visit on the 20th June, and the visit when you arrested him? Where did you meet him, tell me that first?

A. The accused met me on Jasper avenue about midnight.

Q. What did he say to you?

A. He said he was having a game of "Fan Tan" at his place; he said he guessed it was all right, and that he would pay me if I would allow him to go on with the game, and that he would make it all right with me.

Q. Well, did he say anything about the kind of a game this "Fan Tan" was?

A. He said he was doing pretty well out of it, and he would make it right with me.

Q. Now on the occasion of the arrest, that was on what day?

A. On Sunday evening, sir.

Q. Do you remember the day of the month?

A. The 10th of July.

Q. About what time in the evening?

A. I really can't say, it was after dark, somewhere around 9 o'clock, I would think.

Q. It was after dark on the night of the 10th July?

A. Yes, sir.

Q. What did you see on that occasion?

A. I saw two tables occupied with Chinamen.

Q. How many Chinamen?

A. About 4 at one and 6 of them at another.

Q. Now tell us what else you saw on that occasion.

A. I saw the table covered with dice, checkers, and dominoes.

Q. Any money?

A. Yes, sir.

Q. Now what did you do?

A. There was quite a little scramble, we made a little noise, and there was quite a little scramble picking up the money from the table and putting it in their pockets. I got one man when he was reaching for his and took it from him.

Q. Was this dice, money, etc., on the table in front of each man?

A. Yes, sir.

Digitized by Google

Q. Now do you know who was the proprietor of this place?

A. The accused told me he was.

Q. Do you know if those Chinamen who were there were employed in his laundry business?

A. Some of them may have been, but most of them were not. I knew most of them to be employed in other places in the town; in fact, part of the staff was working there that night.

Under sec. 196 of the Code a common gaming house is, amongst other things, a house, room, or place, kept by any person for gain, to which persons resort for the purpose of playing at any game of chance.

In Rex v. James, 6 O. L. R. 37, 2 O. W. R. 342, the accused kept a cigar store with a room in the rear where persons resorted for the purpose of playing poker, and out of the stakes of the game sums were taken from time to time from which to buy cigars from the accused. The question was whether he kept the place for gain, there being nothing to shew that the accused derived any profit except what might arise from the sale of the cigars.

The Court of Appeal unanimously held that there was sufficient evidence to convict; indeed, the reasons for judgment appear to justify the conclusion that the mere fact of the accused keeping the place lighted and heated would be sufficient evidence that he expected to get some profit, or in other words kept the place for gain.

In the case before us there is unquestionable evidence that the accused was the proprietor or keeper of a room or place, and that he kept it for gain, for he stated that he was having a game of "Fan Tan" at his place, and was willing to pay for the privilege of continuing it, because he was doing well out of it.

It was suggested on the argument that this might mean merely that he was having good luck, but, in my opinion, that would make no difference; the game was going on, and he was making money out of it, and consequently wanted to be allowed to continue it; this is clearly evidence that the purpose was one of gain.

The evidence of the chief constable of the character of the game in progress when he visited the accused's place, and which the accused told him was "Fan Tan," shews that it was a game of chance, and that money was changing hands on the game.

Digitized by Google

I have had some doubt as to whether there was evidence that the place was one to which persons resorted, but, after consideration, I am of opinion that the statement of the chief constable that several persons, some of whom did not belong on the premises, were present on two occasions playing the game, and the statement that he was having a game of "Fan Tan," are clearly evidence that it was a place of resort, and, such being the case, there appears to be evidence of the existence of all the elements necessary to constitute a common gaming house, and of the fact that it was kept by the accused.

The weight of that evidence is of course a matter for the trial Judge.

In my opinion, the appeal should be dismissed.

SCOTT and PRENDERGAST, JJ., concurred.

WETMORE, J.—I regret that I am unable to concur with the judgment just delivered.

I am of opinion that the evidence does not establish that the game being played was a game of chance.

I am therefore of opinion that the appeal should be allowed.

NEWLANDS, J., agreed with WETMORE, J.

---

## NORTH-WEST TERRITORIES.

### (NORTHERN ALBERTA.)

JANUARY 20TH, 1905.

SUPREME COURT IN BANCO.

## PERKINS v. JONES.

*Contract — Illegality and Immorality — Part Performance— Locus Pœnitentiæ—Rescission before Execution.*

Appeal by defendant and cross-appeal by plaintiff from judgment of SIFTON, C.J., in favour of plaintiff for the recovery of $325 in an action for $500 paid by plaintiff to defendant in the circumstances mentioned below.

Digitized by Google

The appeal was heard at Calgary by WETMORE, SCOTT, PRENDERGAST, NEWLANDS, and HARVEY, JJ.

C. de W. MacDonald, Edmonton, for defendant.

J. E. Wallbridge, Edmonton, and O. M. Biggar, Edmonton, for plaintiff.

PRENDERGAST, J.—The facts of the present case, in so far as they are material to this appeal, seem to be as follows:

Some time prior to 17th May last, defendant, Thomas A. Jones, a builder by trade, went to the house of plaintiff, whom he knew to be a prostitute, in an endeavour to procure from her the contract for a house which he had heard she desired to have built for purposes of prostitution. Two other interviews seem to have followed this first one, and in the course of what he calls "the negotiations," she having expressed a desire to build near by, south of where she then lived, and he having replied that he "might be able to buy a lot," she went and picked out a lot known as No. 4, a short distance away, saying "If you can get me that lot I will build."

On 17th May the defendant entered into an agreement in writing for the purchase of lot 4, with the owner thereof, the consideration being $450, of which $150 was paid at once, the balance being payable on time.

Two days later, that is, on 19th May, defendant entered into a written agreement with plaintiff whereby he agreed "to build and finish a house according to plan" on lot 4, and give plaintiff a clear title to the same, the consideration being $2,700, of which plaintiff paid $500 at the time of the execution of the agreement, the balance being payable in diverse sums at different stated intervals.

After the execution of the last mentioned agreement and before 3rd June, which is the date of a notice by plaintiff to be hereafter referred to, defendant ordered from a factory, doors and windows for the house in question; and, at a date also subsequent to the agreement, but which from the evidence may have been either prior or subsequent to 3rd June, he brushed the lot and "fixed it up at an expense of $25."

Nothing further was done by defendant until 3rd June, when he received from plaintiff a letter intimating that she had decided not to build, and calling for the immediate return of the $500 paid on account. To this defendant replied in writing that, having ordered sash and doors which he was not at liberty to countermand, he would go on with the contract and hold her to her part of the same. An action

Digitized by Google

then followed for the recovery by plaintiff of the $500 advanced by her, which action, upon being tried by the learned Chief Justice, resulted in a verdict for plaintiff for $325 and costs. And the case was then brought before this Court by way of appeal by defendant and cross-appeal by plaintiff.

Both parties admit, and in fact urge, in their pleadings, that the contract between them was an immoral one. Not only was the house in question to be built for purposes of prostitution, but the terms of the agreement even suggest that it was contemplated that most of the time payments, constituting more than one-half of the total consideration, should be paid out of prostitution money as it was earned.

The main ground urged on behalf of plaintiff is that, although the contract was an illegal one, she had a right to repent as long as nothing was done by defendant in execution of the contract, and that nothing in fact having been so done up to 3rd June, she stands by her letter of that date in loco pœnitentiæ and is entitled to recover on that ground.

For defendant it was urged, on the other hand, that there was part performance of the contract prior to the receiving of plaintiff's notice; and that, even if there was not, plaintiff is not allowed to repent in this case, and the action should not be entertained, on the ground that the contract is not merely illegal but moreover immoral.

If there was part performance of the contract by defendant, it must be either in his purchasing of the lot, the ordering of the sash and windows, or the brushing and fixing up of the land.

With reference to the purchase of the lot by defendant, it was contended by plaintiff that this could not have been in execution of the contract, as upon the three previous occasions when the parties met, the so-called negotiations did not result in any binding agreement, inasmuch as there was no consideration to support the same, and it would in all events be void under the Statute of Frauds. That may be so if we confine ourselves to those immediate facts. But it seems proper to take here a broader view of the matter, and if possible to consider as the one transaction all that, pursuant to previous understanding, was done by defendant towards the common object contemplated by the parties. Plaintiff had said to defendant "If you can get me that lot, I will build," which undoubtedly was not binding in itself. But defendant did in fact go and procure that lot pursuant to this understanding and with no other possible object, in the

Digitized by Google

special circumstances shewn by the evidence, than to build a house thereon for plaintiff; and then, a few days later, plaintiff enters into a written agreement with defendant, dealing with him as owner of the lot she had so caused him to acquire. It was at her expressed desire that he put himself in a position to enter into the agreement, and it seems that from the moment this agreement was passed, she thereby ratified what had previously been done in furtherance of the object contemplated, and all the dealings of the parties up to that time should be considered as one. In that view, the purchase of lot 4 by defendant, followed as it was by the agreement, amounts to part performance of the contract.

As to the sash and windows, defendant did not acquire any proprietary interest by ordering them. According to his own statement, he had at the time of the trial only taken out a part and that to be used in the erection of other houses, and the manufacturer from whom he ordered them states that they were of ordinary measurements and were only charged as taken out. This could not constitute part performance.

With reference to the brushing and clearing of the lot, it seems that a different conclusion should be reached. In certain circumstances, as where building lots are held for sale generally, this brushing might be regarded as an indifferent act, having no special reference to contract. But here, as the lot was bought expressly in view of the contract, the clearing of it was evidently also made with reference to it. A difficulty however arises here, which is that the evidence does not shew whether this clearing was done before or after defendant received plaintiff's notice of 3rd June. It would seem, however, that the onus is on plaintiff in this respect. The contract here is admittedly illegal, and it is certainly the general rule that money paid on an illegal contract cannot be recovered back. There are undoubtedly exceptions to this rule, and plaintiff urges that one of these is to the effect that a party may, in such circumstances, repent by giving notice before any part of the contract is performed. But it lies with the party seeking to recover to shew that he or she comes within the exception, and in the present case plaintiff has to prove that the contract was still wholly unperformed when she gave notice.

It was also urged by Mr. Biggar, of counsel for plaintiff, that the agreement in this case is one which does not admit of part performance, and that it remained wholly unperformed until it was fully performed, inasmuch as it was an agreement to sell a house and lot. But the terms of the agreement and of the receipt for the advance of $500, as

Digitized by Google

well as the advance itself, to a certain extent, shew that the agreement was one to build and sell.

Having upon the question of part performance come to the above conclusions, which must be fatal to plaintiff, it is not necessary to enter into defendant's further contention, based upon a distinction between contracts merely illegal and contracts tainted with moral turpitude.

Although defendant succeeds in this issue, I do not think, as he is conclusively shewn by his own evidence to have been the initiator of this immoral transaction, that he should be allowed costs either of the appeal and cross-appeal or of trial in the Court below.

In my opinion, defendant's appeal should be allowed and plaintiff's cross-appeal dismissed, the verdict of the Chief Justice set aside, and judgment entered for defendant.

WETMORE and SCOTT, JJ., concurred.

HARVEY, J., gave reasons in writing for the came conclusion, basing his finding of part performance solely upon the preparatory work done by defendant in brushing and clearing the lot, and referring to the following cases: Collins v. Blantern, 2 Wils. 341, 1 Sm. L. C., 9th ed., 398; Kearley v. Thomson, 24 Q. B. D. 742; Edgar v. Fowler, 3 East 221; Aubert v. Walsh, 3 Taunt. 277, 12 R. R. 651; Wilson v. Strugnell, 7 Q. B. D. 528; Taffenden v. Randall, 2 B. & P. 467, 5 R. R. 662; Taylor v. Bowers, 1 Q. B. D. 29.

NEWLANDS, J., concurred.

---

## NORTH-WEST TERRITORIES.

### (WESTERN ASSINIBOIA.)

JANUARY 20TH, 1905.

SUPREME COURT IN BANCO.

## REX v. MASSEY-HARRIS CO.

*Constitutional Law — Foreign Companies Ordinance, 1903, N. W. T.—Intra Vires—Manufacturing Company Incorporated under Dominion Companies Act—Application of Territorial Ordinance to—Carrying on Business in Territories without Registration—Conviction.*

An appeal by defendants from a conviction by a justice of the peace for carrying on business in the Territories with-

Digitized by Google

out being registered under the Foreign Companies Ordinance, 1903.

The appeal was heard at Calgary by SIFTON, C.J., WETMORE, SCOTT, PRENDERGAST, and NEWLANDS, JJ.

Norman Mackenzie, Regina, for appellants.

The informant, Edward J. Wright, was not represented.

WETMORE, J.—The appellants were convicted by a justice of the peace for that, being a foreign company under the terms of the Foreign Companies Ordinance, 1903, having gain for their object, they carried on their business in the Territories without being registered under that Ordinance. Application having been made, the justice stated a case under sec. 900 of the Criminal Code, 1892. The penalty imposed by the conviction was merely nominal—only $1 and costs amounting to $2.35. The appeal is really brought and probably the proceedings have been instituted for the purpose of testing the validity of the Ordinance above mentioned. The appellants are a joint stock company incorporated by letters patent under the provisions of the Companies Act, R. S. C. ch. 119, for the purpose of manufacturing and dealing in all classes of agricultural implements, and did carry on their business in the Territories between the dates mentioned in the conviction.

The objections raised to the conviction are:

1st. That the Ordinance was never intended to apply to companies incorporated under the Act.

2nd. If it was so intended, the Ordinance is ultra vires.

I have very grave doubts whether the last-mentioned ground is open to the appellants, because I doubt whether, according to the case as stated by the justice, the proceeding was questioned before him on that ground. However, as the point was not taken at the argument, I will assume that the ground is open to the company.

As to the first ground of objection, the contention is that the appellants are not a "foreign company" as defined by the Ordinance. Clause 1 of sec. 2 provides that "foreign company" shall mean any company or association incorporated "otherwise than by or under the authority of an Ordinance of the Territories for the purpose of carrying on any business to which the legislative authority of the Legislative Assembly of the Territories extends." It is urged that the definition only embraces companies which the Legislative

Digitized by Google

Assembly has power to incorporate, and, inasmuch as the appellants were incorporated to carry on their business thoughout the whole Dominion, they could not be incorporated by the Assembly for that purpose, and therefore do not come within the definition. I do not so read the clause. In order to hold that a company or association comes within the definition it must be proved that it is incorporated for the purpose of carrying on some business to which the legislative authority of the Territories extends. It is not necessary to prove that the Assembly would have power to incorporate it and invest it with all the powers it possesses under the charter which created it. Were the appellants then incorporated for the purpose of carrying on some business to which the legislative authority of the Assembly extends? I am of opinion that they were. It is quite true that the Assembly could not incorporate a company for the purpose of carrying on the business of manufacturing and dealing in all classes of agricultural implements throughout the whole Dominion, but it could, under the power conferred on it by clause 7 of sec. 6 of ch. 22 of 54 & 55 Vict. (1891), to legislate with respect to "the incorporation of companies with Territorial objects," incorporate a company for the purpose of carrying on such a business within the Territories. Moreover, under the powers conferred by clause 9 of the same section, to legislate with respect to "property and civil rights in the Territories," I can conceive that the Assembly would have power to enact Ordinances dealing with business of that nature within the Territories; and, under the powers conferred by clause 2 of that section, to legislate with respect to "direct taxation within the Territories in order to raise a revenue for Territorial or municipal or local purposes," it would have power to pass taxing Ordinances with respect to such a business. This is so well settled by decisions of the Judicial Committee of the Privy Council, and so well understood, that it is only necessary to cite two of the cases decided by that Court on that point, without any discussion of them. I refer to Bank of Toronto v. Lambe, 12 App. Cas. 575, and Brewers and Maltsters' Association v. Attorney-General for Ontario, [1897] A. C. 251. The legislative authority of the Assembly, therefore, quoad the Territories, extends to the business for the purpose of carrying on which the appellants were incorporated, and is embraced by the definition of "foreign company" given by the Ordinance. That, in my opinion, was the intention of the Legislature, and I think that the language of that paragraph is capable of the construction I have put on it.

Digitized by Google

With respect to the Ordinance being ultra vires, I will assume that the Ordinance is a taxing Ordinance, providing direct taxation in order to raise a revenue for Territorial purposes. Such an Ordinance is, on general principles, within the powers of the Legislative Assembly by virtue of clause 2 of sec. 6 of ch. 22 of 54 & 55 Vict., hereinbefore quoted, namely, the authority to legislate with respect to direct taxation, and this authority may be exercised with respect to corporations created by Act of the Dominion Parliament. Parliament creates the corporation, but the local authority may impose the direct tax upon it. This is clearly established by the cases decided by the Judicial Committee, which I have before cited in this judgment. Now, while the Ordinance in question may be essentially a taxing Ordinance, it is possible that it may in some respects have gone farther than it is necessary for a taxing Ordinance to go, and may contain provisions that are at variance and inconsistent with the Companies Act, or with the rights and privileges conferred by virtue of the Act, and, unnecessarily for the purposes of taxation, impose duties of an onerous character not contemplated by the Act. If it does contain such provisions, and if the procedure prescribed is of such a character that these duties have got to be performed before the tax can be received or bcome payable, and the company is prohibited from doing business unless the tax is paid, the Ordinance may, quoad such companies, be ultra vires. I quite concede that the only question this Court has to decide on this appeal is whether the conviction against the appellants is valid or not. And I also concede that the mere fact that there are provisions of the Ordinance which are ultra vires does not in itself make the whole Ordinance ultra vires. If there are portions of the Ordinance which are intra vires, and which, independent of the ultra vires portions, will support the conviction, it is sufficient.

I must say that I had very serious doubts whether sec. 5 of the Ordinance did not require the company, as a condition precedent to registration, to do some acts that were not within the powers of the local legislature to require them to do. I have reference to the provisions of clauses (a), (c), and (d) of that section. On mature consideration, however, I have reached the conclusion that clauses (a) and (c) are intra vires the Assembly, for the reasons stated by my brother Newlands in his judgment, viz., that they are reasonable provisions for the filing of such information in the place specified by the Ordinance for the purpose of affording information of the character specified, to residents within the

Digitized by Google

Territories, and therefore they do not conflict with the provisions of the Companies Act which require information of a somewhat similar character to be filed with the Dominion officer at Ottawa, and that, in view of the general trend of the decisions of the Privy Council on the subject, it is open to the Assembly to enact such provisions.

With respect to clause (d) of the section referred to, it was urged that the section was ultra vires the Assembly, and Lamont v. Canadian Pacific R. W. Co., 5 Times L. R. 60, was relied upon in support of that contention. Section 62 of the Companies Act provides a method for serving summonses, notices, and other documents on a company incorporated under that Act. The language of that section is generally to the same effect as that contained in the section under discussion in the case cited, that is, the restrictive sections provide that the process may be served at the place and in the manner specified. That case was decided upon the ground, and only upon the ground, that, inasmuch as a specific method of serving the railway company had been provided by the Act, and the plaintiffs had sought to effect a service upon them by virtue of the general provisions contained in the Judicature Ordinance, the special provisions of the Act prevailed, and a service could not be effected under the general provisions of the Ordinance; that the maxim "Generalia specialibus non derogant" applied. No question of ultra vires was decided in that case. It was not held that the Assembly could not, notwithstanding the provision in the Act, by special legislation have provided other methods for the service of the company. That question was not raised. It is, in my opinion, raised now, and assuming sec. 62 of the Companies Act to be a special provision relating to the companies incorporated under that Act, I have no hesitation in holding that the North-West Legislative Assembly, in pursuance of the powers given them to legislate upon the subject of the administration of justice, could by special legislation provide other and more convenient methods for the service of process upon any such company, and I take it that by clause (d) of sec. 5 of the Ordinance in question, the Assembly has in effect so provided as regards companies incorporated under the Companies Act applying for registration in the Territories, and, therefore, that the provision that they should file the power of attorney and the declaration therein provided for, is within the power of the Assembly.



Digitized by Google

I have therefore come to the conclusion that judgment should be given in favour of the respondent and the conviction confirmed.

NEWLANDS, J.—. . . The Foreign Companies' Ordinance, 1903, interprets a foreign company to be one that is incorporated otherwise than by or under the authority of an Ordinance of the Territories for the purpose of carrying on any business to which the legislative authority of the Legislative Assembly of the Territories extends.

Section 3 of the Ordinance provides that no foreign company having gain for its object shall carry on any part of its business in the Territories unless it is duly registered under this Ordinance.

The provisions of the Ordinance which have to be complied with by the company before it can become registered are set out in secs. 4 and 5 of the Ordinance as follows: "Any foreign company may become registered on compliance with the provisions of this Ordinance and on payment to the registrar of such fees as would be payable for registration under the provisions of the Companies Ordinance; and shall, subject to the provisions of its charter and regulations and to the terms of the registration, thereupon have the same powers and privileges in the Territories as if incorporated under the provisions of the Companies Ordinance."

"Before the registration of any foreign company, the company shall file in the office of the registrar:

(a) A true copy of the charter and regulations of the company verified in manner satisfactory to the registrar;

(b) An affidavit or statutory declaration that the company is still in existence and legally authorized to transact business under its charter;

(c) A copy of the last balance sheet of the company or a statement containing the information required to be given in the annual statement made under the provisions of sec. 8;

(d) A duly executed power of attorney under its common seal, approved by the registrar, empowering some person therein named and residing in the Territories to act as its attorney for the purpose of accepting service of process in all suits and proceedings against the company within the Territories and of receiving all lawful notices, and declaring that service of process in respect of such suits and proceedings and of such notices on the said attorney shall be legal and binding to all intents and purposes whatever, and waiving all claims of error by reason of such service, and such

Digitized by Google

company may from time to time, by a new or other power of attorney executed and deposited as aforesaid, appoint another attorney within the Territories for the purposes aforesaid to replace the attorney formerly appointed."

Upon compliance with these provisions, the registrar must register the company and issue it a certificate of registration

The power of the Legislative Assembly of the North-West Territories to pass such legislation, if they have that power, is conferred upon them by the North-West Territories Act and the various amendments to that Act, and their powers are similar to those of the provinces, with the exception that all the powers conferred upon them are subject to the provisions of that Act and of any other Act of the Parliament of Canada. The Companies Act, being a general Act applicable to the whole of Canada, would have no greater operation in the Territories than in the Provinces.

Strong, J. (afterwards Chief Justice of the Supreme Court of Canada), in the opinion he gave in Severn v. The Queen, 2 S. C. R. at p. 103, laid down a principle of construction as applied to provincial statutes which has evidently been adopted by the Privy Council in construing all such Acts. It is as follows:

"I do not consider it out of place to state a general principle which, in my opinion, should be applied in determining questions relating to the constitutional validity of provincial statutes. It is, I consider, our duty to make every possible presumption in favour of such legislative acts, and to endeavour to discover a construction of the British North America Act which will enable us to attribute an impeached statute to a due exercise of constitutional authority before taking upon ourselves to declare that, in assuming to pass it, the provincial legislature usurped powers which did not legally belong to it; and in doing this we are to bear in mind that it does not belong to Courts of Justice to interpolate constitutional restrictions; their duty being to apply the law, not to make it."

Acting on this principle, it should be conclusively shewn by the parties attacking the constitutional validity of this Ordinance, that it is ultra vires of the local legislature.

By sub-sec. 2 of sec. 13 of the North-West Territories Act, the Territorial legislature has power to pass Ordinances for direct taxation in order to raise a revenue for Territorial, municipal, or local purposes, and by sub-sec. 9 of that section it has control over property and civil rights in the Ter-

Digitized by Google

ritories. Does this Ordinance come under one or both of these sub-sections?

The Parliament of Canada is the only legislature that has power to incorporate a company to do business in all parts of Canada, but, as was stated in Colonial Building and Investment Association v. Attorney-General for Quebec, 9 App. Cas. at p. 166, what such an Act does is "to create a legal and artificial person with capacity to carry on certain kinds of business, which are defined, within a defined area, viz., throughout the Dominion. Among other things, it has given to the association power to deal in land and buildings, but the capacity so given only enables it to acquire and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land. If the company can so acquire and hold it, the Act of incorporation gives the capacity to do so."

In this case too they cited with approval the hypothetical case given by way of illustration in Citizens' Insurance Co. v. Parsons, 7 App. Cas. 96, where they shewed that a company incorporated by the Dominion might be unable to do business in any of the provinces on account of the provincial laws.

The power of the provinces to impose a direct tax on any company incorporated by the Parliament of Canada is now a well-settled proposition, and I only need cite in support of that proposition the cases decided by the Privy Council of Bank of Toronto v. Lambe, 12 App. Cas. 575, and Brewers and Maltsters Association of Ontario v. Attorney-General for Ontario, [1897] A. C. 231.

The only question that has been raised as to the right of the provinces to legislate as to property and civil rights, is where such legislation comes into conflict with one of the powers conferred upon the Parliament of Canada by sec. 91 of the British North America Act, and the one it comes oftenest in conflict with is sub-sec. 2 of sec. 91, for the regulation of trade and commerce. The construction that has generally been put on "the regulation of trade and commerce" does not include minute regulations affecting the terms and conditions on which persons or corporations carrying on particular trades are to be allowed to do so in particular locations, but rather to matters of a general or quasi-national importance.

In Bank of Toronto v. Lambe their Lordships said that where they say in Citizens Insurance Co. v. Parsons, 7 App. Cas. 111, "that it was found absolutely necessary that the literal meaning of the words shall be restricted in order to

Digitized by Google

afford scope for powers which are given exclusively to the provincial legislatures," it was there thrown out that the power of regulation given to the Parliament meant some general or interprovincial regulation. No further attempt to define the subject need now be made because their Lordships are clear that if they were to hold that this power of regulation prohibited any provincial taxation on the persons or companies regulated, so far from restraining the expressions as was found necessary in the Parsons case, they would be straining them to their widest conceivable extent.

The Parliament of Canada can override by legislation any Ordinance passed by the Territorial legislature, but, if they have not done so in this case, and if the provisions of the Foreign Companies Ordinance, 1903, which are before this Court, fall under either of the two enumerated sub-secs. of sec. 13 of the North-West Territories Act, and do not conflict with the provisions of the Companies Act, I am of opinion that that Ordinance is intra vires of the Territorial legislature.

Section 4 of the Ordinance requires the payment of a fee of the same amount as would be required on the registration of a company under the Companies Ordinance; this provision is of course within the powers of the legislature.

Section 5 provides first for the filing of a copy of the charter. As the above-mentioned fees are regulated by the capital stock of the company, this seems a reasonable provision to enable the registrar to fix the fee. Sub-section (b) requires the filing of an affidavit or statutory declaration that the company is still in existence and legally authorized to transact business under its charter. This seems to be a proper and reasonable provision to shew that the company sought to be registered has still a legal existence, as otherwise it would not be subject to a tax.

Sub-section (c) and (d) would, I think, more properly come under the Territorial Assembly's power to pass Ordinances relating to property and civil rights, and the fact that the Companies Act has also made provisions for the filing of certain information at Ottawa, and also provides a mode of service, is no reason why, in addition to that, the legislature should not provide for the filing of the same kind of information with the registrar for the information of the Territories, nor does the section requiring the filing of a power of attorney and providing an additional mode of service conflict with the Companies Act; and, there being no conflict between them, one being in addition only to the other, I think these

Digitized by Google

provisions are all within the powers of the Territorial Legislature.

It is true that in Lamont v. Canadian Pacific R. W. Co., 5 Terr. L. R. 60, this Court decided that service of a writ on the Canadian Pacific Railway Company could not be made in any other way than that provided in the Act of the Parliament of Canada incorporating the company. That decision put it on the ground that the Canadian Pacific Railway Company's Act was special legislation, but, as that is not the case here, I do not think it applies to this case.

For the above reasons I am of the opinion that the appeal should be dismissed.

SIFTON, C.J., and PRENDERGAST, J., agreed with the opinion of NEWLANDS, J.

SCOTT, J.—I agree that the conviction should be upheld, for the reasons stated by my brother Wetmore, but I desire to state that I think it may be open to question whether a distinction may not be drawn between sec. 62 of the Companies Ordinance and the clause in the schedule to the Act respecting the Canadian Pacific Railway Company, which was considered by this Court in Lamont v. Canadian Pacific R. W. Co.

The latter might be considered as legislation more in the interest of the railway company than in that of persons having claims against it, as the intention may be to entitle the company to require that process for service upon it in the Territories shall be served only in a certain manner, while sec. 62 of the Companies Act may be held to be legislation in the interest of persons having claims against companies incorporated under the provisions of that Act, that is, it provides a means by which process may be served upon such companies, but was not intended to exclude other means of service which might be provided by Provincial or Territorial legislation. If that is the proper construction to be placed upon these enactments, and I entertain doubts as to whether it may not be, it may follow that Territorial legislation providing for other modes of service would be ultra vires with respect to the Canadian Pacific Railway Company, and intra vires with respect to companies incorporated under the Companies Ordinance.

Digitized by Google

## NORTH-WEST TERRITORIES.

### (NORTHERN ALBERTA.)

JANUARY 20TH, 1905.

SUPREME COURT IN BANCO.

## DAVIES v. CANADIAN-AMERICAN COAL AND COKE CO.

*Master and Servant — Injury to Servant — Mines—Want of Ventilation — Explosion — Negligence—Breach of Statutory Duty—Findings of Jury—Contributory Negligence —Reckless Conduct—Misdirection—Evidence—Improper Admission — Insurance by Employers against Risk to Workmen—New Trial—Costs.*

Appeal by defendants from judgment of SIFTON, C.J., in favour of plaintiff, upon the verdict of a jury, for $1,500, in an action for damages for injuries received by plaintiff owing to the alleged negligence of his employers, the defendants.

The appeal was heard at Calgary.

F. B. Martin, Pincher Creek, and E. P. McNeill, Macleod, for appellants.

Charles F. Harris, Macleod, and R. B. Bennett, Calgary, for plaintiffs.

The judgment of the Court (WETMORE, SCOTT, NEWLANDS, and PRENDERGAST, JJ.), was delivered by

WETMORE, J.—Plaintiff was a miner in the employ of defendants, who carried on and operated coal mines at Frank in the North-West Territories. On 28th September, 1902, he was ordered by Morris, defendants' manager at Frank, to enter the mine for the purpose of executing some work in connection with mining. He entered the mine accordingly with two companions, one Haines and one Clark. They proceeded to the immediate vicinity of the place where they were ordered to work; each of these men carrying a naked light, and Haines having a safety lamp, which was not lighted. They encountered explosive gas, which was ignited, and an explosion occurred whereby Haines and Clark were

Digitized by Google

killed and plaintiff suffered personal injury for which he brings this action. The case was tried before the Chief Justice and a jury, who found a verdict for plaintiff for $1,500 damages, from which defendants appeal.

At the hearing of the appeal it was insisted on the part of plaintiff that defendants omitted to perform the statutory duty cast upon them by sec. 39 of C. O. ch. 16, the Coal Mines Ordinance, in the following respects: 1st. To constantly produce an adequate amount of ventilation in the mine. 2nd. To have the mine inspected before work was commenced, by a fire boss, whose report should be posted. 3rd. To provide a station at the mine entrance through which the miners would pass when entering the mine. 4th. To permit only locked safety lamps to be used where there were likely to be dangerous accumulations of gas. 5th. To keep a barometer and a thermometer at the entrance of the mine so that the same might be observed by the miners on entering the mine.

Plaintiff delivered particulars of the acts of neglect which he charged the defendants with, and I very much doubt whether all these grounds set up by plaintiff are within these particulars. It is not necessary, however, to decide that question, as it was not raised by counsel for the appellants.

Four questions were submitted to the jury by the trial Judge, which are as follows: 1st. Was there injury to plaintiff caused by any negligence of defendants? 2nd. Or was it caused by his own negligence and want of proper care and caution? 3rd. If you find that the injury was caused by the negligence of defendants, wherein did such negligence consist? 4th. At what sum do you assess the damages to plaintiff?

The jury answered the first question in the affirmative, the second in the negative, and in answer to the third they found that the negligence consisted, 1st, in insufficient ventilation, and second, that the evidence produced shewed insufficient coal in chute 84 to stop leakage; and they assessed the damages at $1,500. Both answers to the third question were in the direction that defendants' negligence consisted in insufficient or improper ventilation.

It was contended on behalf of appellants that there was no case to go to the jury, and a nonsuit was moved for at the end of plaintiff's case, also at the close of the whole case.

In view of the findings of the jury, I am of opinion that this Court is only concerned in the question of whether

Digitized by Google

there was sufficient evidence to go to the jury upon the question of improper or insufficient ventilation. All the authorities point in the direction that in order to maintain an action where the omission to carry out statutory provisions of this nature are concerned, it must be proved that the accident occasioning the injury was brought about by the omission to carry out the particular statutory provision, and was the proximate result thereof. It is not necessay to cite any other authority for this proposition than Canadian Coloured Cotton Mills Co. v. Kerwin, 29 S. C. R. 478.

The jury, having answered the questions in the manner stated, made no finding whether any omission of the statutory provisions other than that of want of proper ventilation occasioned the accident, or that it was the proximate result of such omission, and both of these questions were for the jury. I will therefore simply deal with the question whether there was sufficient evidence to warrant the jury in coming to the conclusion that there was negligence on the part of defendants at common law in respect to ventilation, or whether the improper ventilation was in consequence of the omission to carry out the statutory provisions as to ventilation. I am of the opinion that there was evidence which would warrant the jury in coming to the conclusion that the improper ventilation was due to the negligence of defendants, and also to their omission to carry out their statutory obligations.

Rule 1 of sec. 39 of the Ordinance above referred to provides that "an adequate amount of ventilation shall be constanly produced in every mine to dilute and render harmless the air to such an extent that the working places of the shafts, levels, stables, and working of such mine, and the travelling roads to and from such working places, shall be in a fit state for working and passing therein." Rule 2 provides what shall be an adequate amount of ventilation; that is, how many cubic feet of pure air per minute shall be required for each man, boy, horse, and mule employed in a mine.

It was urged on the part of defendants that the provisions of Rule 2 were complied with, inasmuch as the requisite number of cubic feet was provided, but that is not sufficient to my mind. It must not only be provided, but arrangements must be made to so distribute it that the persons working in the mines and passing along its roads and working places shall have it supplied to them. Section 20 of the Ordinance provides for the examination of candidates for certificates as pit bosses or fire bosses, and for a certificate

Digitized by Google

of qualification to be issued to them on passing the examination; and then sec. 21 provides that no person shall act as a pit boss or fire boss in any mine operated under the provisions of the Ordinance unless he is the holder of such a certificate. Rule 3 of sec. 39 provides that "in every mine in which inflammable gas has been found within the preceding 12 months, once in every 24 hours if one shift of workmen is employed, and once in every 12 hours if two shifts are employed, during any 24 hours, a fire boss shall, so far as is reasonably practicable, immediately before the time for commencing work in any part of the mine, inspect with a safety lamp that part of the mine and the roadways leading thereto, and shall make a true report of the condition thereof so far as ventilation is concerned, and a workman shall not go to work in such part until the same and the roadways leading thereto are stated to be safe."

Inflammable gas had been found in this mine within the 12 months preceding the accident, but no examination has been made by a fire boss, as provided for by that rule—as a matter of fact defendants had no fire boss in their employ. It was urged that Morris, the manager of the mine, who held a certificate as a manager, was qualified as a fire boss. There is no evidence to establish what the character of the examination shall be for either manager, fire boss, or pit boss, and I have no reason to assume that, because a person can pass an examination to entitle him to a certificate as a manager, he could pass an examination which would entitle him to a certificate as a fire boss. I can quite conceive that the duties of each might easily lie in an entirely different direction.

Now, as a matter of fact, on the occasion in question, inflammable gas was found in the mine roadway where plaintiff and his companions were proceeding to their work. If it had not been there, the accident would not have occurred, and I am of opinion that the jury, inasmuch as defendants had not taken the precautions directed by the Ordinance to ascertain that the mine and its passages were properly ventilated, which would include being free from inflammable gas, were justified in coming to the conclusion that the presence of gas there was due to the negligence of defendants or their omission to carry out the provisions of the Ordinance. I am also of the opinion that there was other evidence which pointed in the direction that there was insufficient ventilation, which would justify the jury in coming to the same conclusion. Plaintiff in going to his work entered the mine tunnel in the direction in which the air was moving until he came to the point at which he desired to

Digitized by Google

ascend to where the proposed work was to be done. His companions stayed at this point, while he went forward a considerable distance further on to procure another safety lamp, which he was informed he could find there. At a very short distance, comparatively speaking, from where he had left his companions, he found smoke, and he testified to the fact—as I will point out later on—that this indicated stagnancy in the air, or, in other words, that the air was not flowing along as freely as it ought to have done. The exact point where this stagnancy commenced may not be clearly proved. It may have been caused by a leakage, as, for instance, the door of a manway not being in proper condition, or it may have been caused by a chute not having a sufficient quantity of coal in it to prevent the air escaping through it to the floor above; but, whatever the cause might be, it indicated that the ventilation was not good, and the consequence would be that, as the current of air passed through and along this lower tunnel near the face of the work, and then ascended and passed along and through the tunnel above (it would be in a direction just contrary to that in which it was passing in the lower tunnel), impure air would be found in the upper tunnel where this accident occurred. Then we have evidence that one of the chutes, No. 84, had not sufficient coal in it to prevent the escape of the air up through it, and then we have the further fact that in one place the bratticing was insufficient. It was urged that the evidence of the witnesses who swore to the fact of the chute not having a sufficient quantity of coal in it, was not reliable. That might have been proper to urge before the jury, but the credibility of the testimony was for them. It was also urged that it was proved that the defect in the omission to cure the insufficiency of the bratticing was due to plaintiff himself. That was admitted to be proved by Morris, but I think that he went all to pieces—if I may use that expression—on being cross-examined on the subject, and the jury were quite justified in throwing his evidence in that respect to one side. It was also urged that Morris, a competent engineer, had also examined the mine in the afternoon of the day in question about 4 hours before the plaintiff and his companions went into the mine as stated, and that he swore that the ventilation then, at the very place in question, was not sufficient. In the first place I wish to say as before stated, that Morris was not a fire boss—in the next place that on his cross-examination it appeared very doubtful whether he had examined the mine at the time he said he had—and the jury, in my opinion, were quite justified in rejecting his testimony in that particular.

Digitized by Google

The jury were, therefore, justified in coming to the conclusion that there was negligence on the part of defendants, and in giving the answers which they did give to the first and third questions submitted to them, because, in my opinion, the omission to attend properly to the ventilation, both from the standpoint of common law and the standpoint of the statutory obligations, was a negligent act, and it was in one sense the proximate cause of the accident, because, if the ventilation was proper, the inflammable gas would not have been there and the explosion would not have occurred.

But it is urged on behalf of defendants that plaintiff was guilty of contributory negligence which was the proximate cause of the accident—that is, if it had not been for his own carelessness and recklessness with a full knowledge of the danger, the accident never would have occurred. The question of contributory negligence was one for the jury, and they have found by their answer to the second question in effect that plaintiff was not guilty of any contributory negligence. I am of opinion that this finding is so wholly at variance with the weight of evidence and the testimony of plaintiff himself, that their answer to that question is most unsatisfactory, that their answer ought to have been the other way, and that consequently the verdict should have been entered for defendants upon the question of contributory negligence, and that therefore the verdict must be set aside and a new trial granted.

In the first place, plaintiff was a miner of many years' experience, and at one time had been a fire boss in another mine. He was aware that gas had, some weeks before the happening of this accident, been discovered in the mine, and had on occasions in the interval been found there. He admits that on the Saturday preceding the accident—that is, the day before the accident, which happened on Sunday—he had been informed by Morris, the manager, that inflammable gas was to be found at the very place, or in the vicinity of the very place, where he was directed to go to work, and so much impressed was he with that information that on the Saturday, although ordered to go to work there, he would not go because he could not procure a safety lamp. Nevertheless on the Sunday, with all this information, he goes in there to work, first, however, having taken the precaution of procuring a safety lamp, which he states he took in for the purpose of testing for inflammable gas when he arrived at the point where testing would be prudent or desirable. As already stated, in going into the mine in the lower tunnel, and going with the current of air, he and his companions

Digitized by Google

came to No. 8 manway, and he went on to the face of the mine for the purpose of getting the second safety lamp spoken of. (I may say that this safety lamp was found not to be of any use and was not used, and the only serviceable safety lamp they had was the one that was brought in with them when they entered the tunnel). On plaintiff's way for this second safety lamp he passed No. 9 manway, still going with the current of air, and he noticed from No. 9 manway to the face of the mine, a very considerable distance, that there was smoke, and that the air was what he called stagnant. I have already stated how the current of air passed through this lower tunnel and ascended to the tunnel above and came back along the upper tunnel in the opposite direction. Now plaintiff noticed this stagnancy, and he was alive to the fact it was dangerous, that it indicated that the ventilation was not sufficient or proper. The lamp that he was going for at the face of the mine was one that had been left there by one Mort. I give the questions put to plaintiff on his cross-examination and his answers thereto bearing upon the matter I am now considering.

Q. Was there any trace of gas at the end of manway No. 8?

A. No, sir.

Q. You had gone right through the chute No. 101 to get the lamp Mort left there?

A. The lamp that was in the tunnel.

Q. That was to where the air came into the tunnel?

A. Yes, sir.

(That must have reference, from the context, to the air that came into the upper tunnel from the lower one.)

A. And the air was perfectly pure along there?

A. Not all the way.

Q. Where did it first shew indications of gas?

A. There was smoke all around No. 9.

Q. What would that indicate?

A. That there was no air going through that way, else it would have cleared it away.

Q. Did you mention that to any one?

A. No, sir.

Q. After discovering that, you got your lamp and went back to No. 8?

A. Yes, sir.

Digitized by Google

Q. And you knew that then there was something wrong with the air in No. 8?

A. No, sir.

Q. You told me that when you went into No. 9, there was smoke in the tunnel in the entrance?

A. Yes, sir.

Q. What did that indicate?

A. That there was smoke there.

Q. With reference to the air?

A. That there was no air.

Q. That there was something wrong with the ventilation?

A. Yes, sir.

After being further interrogated as to what effect this discovery had upon him, and as to what it would indicate, and his giving answers obviously intending to evade answering, the following question was put to him:

Q. Tell me as briefly as you can what that would indicate as regards the air?

A. That there was no air in the tunnel.

In stating that it would be about 100 yards from No. 9 manway beyond which he found the smoke to the place at which he found the lamp, and having stated that he came back to No. 8 manway, and that the smoke extended all the way from No. 9 manway to chute No. 101, which was at the face of the works, the following question was put to him:

Q. And still you went through that and back again without making any examination as to the cause of the smoke?

A. It was not my duty.

Q. You had your life in your hands, you were anxious that the mine should be safe for yourself?

A. Yes, sir.

Q. That was your very object in going to get the lamp?

A. Yes, sir.

Q. Still you saw indications to shew that something was wrong and you made no inquiries of anyone?

A. There was no one there to make inquiries of.

Q. Was it not your duty to go out of that mine and report that?

A. If I came out of the mine it would be a mile and a quarter, and I would put on my clothes and have gone home.

Q. What I am asking you is, you knew perfectly well that something was wrong with the air from No. 9?

A. I saw smoke there at the entrance of No. 9.

Digitized by Google

Q. And that would indicate that the air was wrong?
A. I do not think that there was a door on No. 9.

Q. What has the door to do with it?
A. The door to close the manway, and then the air would go on the face.

Q. What effect would the air have on the smoke you were talking about? Was the smoke on No. 9 travelling or stagnant?
A. No, it was stagnant.

Q. That would prove that the air was stagnant on No. 9 manway.
A. Yes, sir.

Q. And that would prove that from there to the face of 101 chute in the in-current of air and the out-current following the air course, that the air was wrong, that the air was stagnant, something was wrong?
A. Yes, sir.

Q. And you knew that as a skilled miner?
A. Yes, sir.

Q. And you did not report it?
A. No, sir, did not report it, because it was already reported.

Q. But the air had to go through and back again to make your place safe?
A. Yes, sir.

Q. So, if the air was stagnant there, your place of work would be unsafe, is that not right?
A. It was all right to No. 9, and I think the air was good that way.

Q. Did you make any attempt to find out?
A. No, sir.

Q. You knew something was wrong for 100 yards in the main air tunnel while you were still in a place of safety, and you did not report it, or try to find out what was wrong?
A. There as no one to report it to.

Q. And you did not look for it?
A. No.

Q. And then knowing the air was stagnant in this way, you still did not take the precaution to light your safety lamp before going up No. 8?

A. No, sir.
Q. You had discovered this air stagnant and this smoke?
A. Yes, sir.

Digitized by Google

Q. So that you were the man who made the last discovery of the condition of the mine; it was not Copeland and not Haines; you were the man who discovered the condition of the mine?

A. Yes.

Q. And you did not report it?

A. No, sir.

Q. And then knowing, as you had discovered yourself, that things were wrong, you did not light your safety lamp?

A. No, because I had no safety lamp.

(This answer is immaterial because Haines had a safety lamp which was available for plaintiff to use.)

Q. You would not go in on Saturday, what made you change your mind?

A. We had a safety lamp when we went in on Sunday.

Q. You refused on Saturday to go in because you had not a safety lamp?

A. Yes, sir.

Q. And yet on Sunday, after discovering stagnant air, you took no precaution, and walked in ahead with a naked light against the current of air?

A. Yes, sir.

Q. Your light burning?

A. Yes, sir.

Q. Against the current of air?

A. Yes, sir.

Q. And making no investigation?

A. No, sir.

Q. And you knew perfectly well that it was dangerous for you, that the gas would not be carried off if the air was not working, dangerous for you or anybody else?

A. Yes.

Q. That no miner would work in the mine unless the ventilation was proper, that the mine was not safe, is that not so?

A. Yes.

Q. If you had gone in with your safety lamp lighted and your naked light out, you would have discovered the gas in time to save yourselves?

A. I guess we would.

Digitized by Google

Q. If at the foot of No. 8 manway, after you came back with that knowledge of the stagnant air, you had put your naked lights out and Haines had lit the safety lamp which you were both taking in for your mutual safety, you would have discovered the gas?

A. Yes, sir.

Q. And you did not do it?

A. No, sir.

Now in the face of this knowledge, in the face of the fact that he was aware that it was dangerous to do so, he went up No. 8 manway and walked against the current of air, right in the direction of where he had found the stagnant air in the lower tunnel, and where he was liable to find inflammable gas by reason of the stagnancy of the air. How in the world, with such testimony before them given by plaintiff himself, the jury could come to the conclusion that he was not guilty of contributory negligence, I am quite at a loss to understand. It seems to me that the conclusion is irresistible that, knowing the danger, fully alive to the danger, he—I might almost say—recklessly walked right into it with a naked light. It was urged on behalf of plaintiff that defendants, having been guilty of a breach of the statutory obligations, must take the consequences in any event of the omission, and the fact that plaintiff was aware of the danger was no answer to his right to recover, and that the maxim volenti non fit injuria did not apply: Baddeley v. Earl Granville, 56 L. J. Q. B. 501; Grant v. Acadia Coal Co., 32 S. C. R. 427; and Smith v. Baker, [1891] A. C. 325. Now none of these cases lays down the rule that the maxim volenti non fit injuria does not apply to any case where the accident is brought about by the omission to perform a statutory duty. They merely lay down the rule that accidents may arise of omission where the maxim would not apply. For instance, in Grant v. Acadia Coal Co. defendants had employed competent officials for the superintendence of the mine, and required that the statutory regulations be observed. They were not observed through the company's employees not doing what they were instructed to do, and the company sought to escape liability by reason of that. The Court held that that was no defence, that they were bound to perform their statutory obligations; and, as I should infer from the judgments, it was urged on the part of defendants that plaintiff being aware of the defects, it was incumbent upon him to leave the company's employ, and if he did not do so, the maxim in question applied. The Court simply held that it did not



Digitized by Google

apply in such a case. Then in Smith v. Baker plaintiff was engaged in an employment not in itself dangerous, but he was exposed to danger arising from an operation in another department over which he had no control; the danger being created or enhanced by the negligence of the employer. As a matter of fact the other operation in which the danger consisted was the fact that stones were being slung over the heads of the workmen engaged in the work in which plaintiff was engaged, and he was aware of that danger, and he with the other workmen, when stones were being slung, would occasionally run away to escape the danger. It was contended here as in Grant v. Acadia Coal Co. that plaintiff was aware of the danger, and that he should not continue in the employ, and the maxim applied, but the Court held that it did not apply in that case. I can find no case such as the present, where plaintiff himself, being aware of the danger, deliberately and recklessly—if I may use the expression—walked into it himself, and was the proximate cause of the accident happening, in which it was held that the maxim did not apply. In my judgment, it was such contributory negligence that the jury ought to have found that and given a verdict for defendants.

I am also of the opinion that defendants are entitled to a new trial upon the ground of misdirection by the trial Judge. In charging the jury upon the question of contributory negligence he instructed them: "It is practically for you to decide as to whether the company in this particular case exercised the precautions that they should have exercised in the carrying out of the statute, and in the carrying out of those principles of common law for the purpose of properly protecting their workmen, and provided you find that they did carry out these provisions, and that, notwithstanding their carrying out of those provisions, an accident occurred, then it is also for you to consider whether plaintiff in this case had such a knowledge of all the circumstances as laid on him the duty that he should have himself guarded his life, or guarded himself from entering into danger on that particular Sunday night, whether he with the knowledge that he had was guilty of such culpable negligence in going there, because if he was, then he did not exercise the care that an ordinary miner—not a man who was there as a stranger or a new man—but an ordinary miner, gives."

I am of opinion that this direction was erroneous, in the first place because the jury were instructed, it seems to me, practically and in effect that the question of contributory

Digitized by Google

negligence only arose in case the jury found that defendants did not carry out their statutory obligations and their common law duties. I wish to say that if defendants had carried out their statutory obligations and common law duties, there would be no right of action against them at all, and there would be no necessity in such a case to enter into the question of contributory negligence. The question of contributory negligence only arises when negligence from the omission of some statutory duty arises on the part of defendants, and, if contributory negligence exists, that affords a matter of defence in withstanding the original negligence or want of duty on the part of defendants.

Then, I think, the Judge also erred in using the expression "culpable negligence," leaving it to the jury whether plaintiff was guilty of such culpable negligence in going there. I think that was a word which was calculated to mislead the jury in giving them an impression that the negligence might not amount to contributory negligence, if in the mind of the jury it was not culpable neglgence. This is a strong expression to use, and the jury, it seems to me, might not understand what the negligence required was, either in commission or omission of an act which plaintiff, as a prudent man of ordinary knowledge of the law, would not or ought not to have committed.

I am also of the opinion that there must be a new trial upon the ground of the improper admission of the policy of insurance. That evidence had, in point of law, no material bearing upon the case at all, and was to my mind clearly inadmissible. It was urged, however, that the admission of this testimony ought not to be a ground for granting a new trial, because it could not have affected the minds of the jury. I am of the opinion that this testimony was calculated to affect the minds of the jury in rendering a verdict in this case, and I cannot help but come to the conclusion that it was pressed in on the part of plaintiff in the hope that it would have such effect. I have too great respect for the legal knowledge of both the counsel for plaintiff to believe that they were not aware that this evidence was not admissible, and I cannot conceive with such knowledge that such testimony would have been pressed in, unless they felt that it would probably have some effect, and it is rather a coincidence in my mind that the verdict of the jury was for $1,500, just the amount limited for which the insurance company would be liable in respect to injuries or death to one person, and the fact that the jury were influenced by this policy in reaching that amount, is further impressed upon

Digitized by Google

me by the fact that on the evidence I am disposed to think the damages rendered are excessive. It is just a case, it seems to me, where a jury would be likely to say, "A verdict against the company is not going to be a serious matter to them, because they are protected by a policy of insurance effected with a company who are paid for taking the risk."

Upon all these grounds, I am of opinion that the verdict should be set aside and a new trial ordered, and I am of opinion that plaintiff should be ordered to pay the costs of this appeal. I do not know that I would be disposed to make this order as to costs if the new trial merely went upon the ground that the jury found the question of contributory negligence against the weight of evidence, or on the ground of misdirection of the trial Judge, but I do think that when the counsel press in evidence of the character to which I have referred, and thereby drive the party against whom it is pressed in to apply to the Court for a new trial, their client has got to take the consequences of their so doing.

---

## NORTH-WEST TERRITORIES.

### (SOUTHERN ALBERTA.)

HARVEY, J. JANUARY 26TH, 1905.

TRIAL.

### BAKEWELL v. MACKENZIE.

*Executors and Administrators — Action against Administrators to Recover Possession of Chattels Found on Person of Intestate—Proof of Ownership—Corroboration —Declaration that Intestate Held Land in Trust for Plaintiff — Resulting Trust—Illegal and Immoral Purpose.*

Action against the administrator ad litem of the estate of William F. Cuthbert, deceased, to recover posssssion of certain chattels which were in the possession of deceased at the time of his death, and also for a declaration that the deceased held certain lands as trustee for plaintiff.

The action was tried without a jury at Lethbridge.

C. F. P. Conybeare, K.C., and C. F. Harris, Macleod, for plaintiff.

L. M. Johnstone, Lethbridge, for defendant.

Digitized by Google

HARVEY, J.—On 21st June last one William F. Cuthbert, of Fernie, B.C., was accidentally killed at Lethbridge, N. W. T., and on his person at the time of his death were found $4,990 in bank bills, a quantity of jewelry, and certain documents, including a certificate of ownership issued by the registrar of the Southern Alberta Land Registration District, in the name of William F. Cuthbert, for lots 10 and 11, block 19, plan 723 d, Lethbridge, and dated 16th May, 1892. Of the money, an amount of about $120 was used for funeral expenses of the deceased, and the remainder, together with the other chattels, was taken possession of by defendant in his official capacity as public administrator for this judicial district. Plaintiff, alleging that all of the chattels found on the person of the deceased were her property, procured the appointment of defendant as administrator ad litem, and brought this action for the purpose of recovering possession of the chattels, and also for a declaration that the deceased held the lands above described as trustee for her, and for a conveyance or order vesting the title in her. . .

The statement of claim alleges that all the chattels referred to were delivered by plaintiff to defendant on the day preceding his death, to be taken by him for her to Fernie; that the lands mentioned had been purchased by plaintiff with her money in the year 1891, and the title taken in the name of deceased; that in or about the year 1901 the deceased executed and delivered to plaintiff a transfer of the lands, which, however, was never registered. Defendant by his statement of defence put in issue plaintiff's statements.

Upon the opening of the trial defendant applied for an amendment to his statement of defence in order to set up the defence that if any transfer had been given by deceased it was void, as having been given for an illegal purpose, namely, that plaintiff might use the premises for illegal or immoral purposes, and further that plaintiff could not succeed in having the deceased declared a trustee for her benefit, because it was always the intention of plaintiff, with the knowledge of deceased, that the lands should be used for an illegal or immoral purpose; and also to set up the further defence of laches and acquiescence. Plaintiff's counsel objected to the proposed amendment, but asked for leave to file a reply to the amended defence setting up peaceful and undisturbed possession of the lands for over 12 years. I reserved the question of the allowance of the amendments, but allowed evidence to be given as if the amendments had been made. I am of opinion that the amendments should be allowed.

Digitized by Google

On the argument, after the evidence had all been given, plaintiff's counsel asked to amend the statement of claim. Defendant's counsel, who had not had an opportunity to consider the proposed amendments, would not consent. This proposed amendment does not appear to raise any new issue, but merely sets out more definitely and in greater detail the documentary chattels claimed and the claim of plaintiff in respect to the land, and, such being the case, I see no objection to its being considered. The statement of claim, even as amended, does not specify all of the articles found on the deceased and produced by defendant, but does specify some documents which were not found. As, however, it appears from the evidence that all of the articles found were produced and exhibited in Court, and that all of the articles so produced were so found, and as counsel on both sides appeared to assume that they were dealing with all of the articles so produced, I shall treat the pleading as applying to all of the articles.

It appears from the evidence that plaintiff and deceased had been acquainted for a great many years; that during this time plaintiff had been living a life of prostitution, or, as she expressed it, "a fast life;" that deceased lived with her a part of the time; that they were on the most friendly terms, she having advanced him money at different times to carry on business; that they had contemplated marriage, but, one or both being married during at least a part of this period, a marriage had never been consummated; that at the time of his death deceased, who then resided at Fernie, was at Lethbridge on a visit; that plaintiff had decided to leave Lethbridge and go to Fernie after making a visit in the United States; that she packed her trunk and had it checked to Fernie, and gave the check as well as other chattels to deceased, and then left Lethbridge just prior to the accident causing his death.

The only evidence of plaintiff's ownership of the chattels in question is her own testimony and the character of some of the chattels themselves, most of the documents consisting of notes, mortgages, etc., in plaintiff's name, and some of the jewelry being engraved with the name or initial of plaintiff; and as to the money the evidence of the bank officials that plaintiff on the day before the accident drew from the Bank of Montreal $5,000, $4,000 of it being in new Bank of Montreal bills, which the bank manager believed to be the bills found on deceased.

Digitized by Google

It was urged by defendant's counsel that, this being an action against the estate of a deceased person, the evidence of plaintiff must be corroborated; that there was not sufficient corroboration as to any of the chattels, and no corroboration whatever as to some of them.

It is perhaps open to question whether, as respects these chattels, this is an action against the estate of a deceased person, but, if it is not, it is so similar in character that I think the same rules of evidence should apply, but the latest authorities I have been able to find seem to establish that there is no rule of law requiring corroboration in such cases.

The case of Rawlinson v. Scholes, 79 L. T. 350, was an action against executors for money lent to deceased. The action was dismissed on the ground of want of corroboration, but on appeal to a Divisional Court consisting of Lord Russell, C.J., and Wills, J., a new trial was ordered. Lord Russell says: "There must be a new trial. The case of In re Finch, 23 Ch. D. 267, is inconsistent with the later case of In re Hodgson, 31 Ch. D. 183. In the former it is said that it is the duty of the Judge to direct the jury not to act upon the unsupported evidence of the claimant in such a case as this. That is not his duty. He should direct them not to act upon it unless it brings conviction to their minds that it is true. The learned Judge in this case seems to have thought that, whether convinced or not that the claim was honest, he was bound to find against it in the absence of corroboration of the evidence of the claimant. This is wrong. He ought to examine that evidence with care, even with suspicion, but if, after that, he felt that it was evidence of truth he should act upon it. He ought to be completely satisfied before allowing the claim; but he ought not to disallow it, satisfied or not, merely because the evidence was not corroborated. I wish to add that I accept as good law the doctrine laid down by Sir James Hannen in In re Hodgson at p. 183."

I adopt the decision in this case as the correct interpretation of the law on the subject, and apply it in the determination of this case.

The evidence of plaintiff was given in an entirely straightforward manner, and I have no reason whatever to doubt its truthfulness. As regards the money, I am fully satisfied that not only was it given to deceased by plaintiff, but that it was given to him for plaintiff's use and not for his own,

Digitized by Google

and that she is entitled to have it returned to her. As regards the trunk and contents, the check for which was found on deceased, I am also convinced that they were plaintiff's, and the same regarding all of the documents with the exception of the certificate of ownership above referred to. The jewelry consists of two sorts, articles of female adornment and articles of male adornment, and somewhat singularly this classification divides them into groups of some importance for the determination of the rights involved, namely, articles which plaintiff gave to deceased at the same time that she gave him the money, and other articles which he had had in his possession and use before that time. The second group consists of a man's watch and chain with a charm consisting of a gold sovereign with the letter F. engraved on it, a man's diamond ring, a pair of cuff links, a gold collar button, and three gold studs. All of these articles had been in deceased's possession and use for several years, but plaintiff states that she had only given them to him to wear but not to keep, but while I do not question the correctness of plaintiff's opinion that the deceased would have given them back to her if she had asked at any time, yet, in view of the relations existing between the parties, and the character of the articles, it seems to me very reasonable to think that at the time they were given to deceased they were intended for his permanent use in the same way as anything of the same sort given by a wife to her husband would have been. In other words, the uncorroborated evidence as to these articles does not convince me so as to bring the case within the rule of Rawlinson v. Scholes, above cited, and I must decide in defendant's favour, but as to all the other articles of jewelry I feel no doubt, and find in plaintiff's favour.

I now come to the certificate of ownership of the Lethbridge lots, and the claim to the ownership of the lots. Plaintiff states that with the certificate of ownership, when she gave it to deceased, was a transfer from him to her, and there is the evidence of one J. S. T. Alexander, a barrister and solicitor of Fernie, B.C., who states that he is inclined to believe that he drew a transfer from the deceased to her in the autumn of 1901, but is not positive. There appears to have been no transfer found on the person of the deceased with the other papers, and, if there ever existed a transfer, there is no evidence that it was sufficient to pass the title, and plaintiff's claim must therefore fail on this branch. Plaintiff must then rely on her ability to establish a resulting trust by reason of the purchase money having been paid by

Digitized by Google

her. The evidence fully establishes, to my satisfaction and with sufficient corroboration, that plaintiff paid the purchase money, and that deceased never considered the property his, but it also establishes beyond any doubt that the reason that the transfer was made from the vendors to deceased instead of to plaintiff was because the vendors would not convey to her, knowing the use to which she would put the property, and consequently she paid the purchase price to deceased, who then, on her behalf, but without disclosing her identity, purchased the property and took the transfer in his own name. The evidence satisfies me beyond any doubt that the intention of plaintiff, concurred in by deceased, in taking the property in his name, was to enable her to use it for illegal and immoral purposes, namely, for purposes of prostitution, and that it was for many years so used. It scarcely seems necessary to cite authorities in support of the view that the Courts will give no assistance in the carrying out of illegal and immoral transactions. The principle as applying to contracts was fully illustrated in the case of Perkins v. Jones (ante), argued and decided at the last sittings en banc of this Court, in which it was held that money paid under a contract for the erection of a house to be used as a house of ill-fame could not be recovered back. The same principle appears clearly to apply to such cases as the present, in which a claim is made under an alleged trust created for some illegal or immoral purpose.

In Rosenburger v. Thomas, 3 Gr. 635, the Court refused to give any assistance to plaintiff in recovering back lands conveyed for the purpose of defeating a judgment against him. This case is cited and followed in Mundell v. Tinkis, 6 O. R. 625, and is accepted as authoritative in Mulligan v. Hubbard, 5 Man. L. R. 225, though in the latter case plaintiff was allowed to recover on the ground that the illegal purpose had not been carried out, but, in view of the expression of opinion by the Court of Appeal in Kearley v. Thomson, 24 Q. B. D. 742, it is doubtful whether the dissenting judgment of Killam, J., rather than the judgment of the Court, does not express the true state of the law even on that ground. Killam, J., reviews at some length the authorities on the general principle, and I entertain no doubt on these authorities that in such a case as the present plaintiff should receive no assistance from this Court, on the rule laid down by Lord Ellenborough, C.J., in Edgar v. Fowler, 3 East 221, where he says: "But we will not assist an illegal transaction in any respect. We leave the matter as we find it, and then



Digitized by Google

the maxim applies melior est conditio possidentis." Following this rule, defendant now having possession of the evidence of title, as in Brackenbury v. Brackenbury, 2 Jac. & W. 391, the Court will not interfere even to deprive him of them. I do not consider the plea of plaintiff of peaceful possession, because it does not appear to have any application to this case, since defendant is not setting up any claim, but merely resisting plaintiff's claim on the ground which I have considered.

In the result, judgment will be for plaintiff for the money, the trunk and contents, and all of the chattels found on the person of the deceased and now exhibits in this case, except the watch, watch chain, and charm, the large diamond ring, the cuff links, collar buttons and studs, and the certificate of ownership. The action as to everything else will be dismissed. The articles will be handed out to the parties entitled or to their advocates.

As the counsel for plaintiff stated on the argument that he had undertaken to be responsible for defendant's costs, I make no order as to costs.

---

Digitized by Google

THE

# Western Law Reporter

VOL. I. TORONTO, FEBRUARY 15, 1905. No. 2.

## MANITOBA.

PERDUE, J. FEBRUARY 3RD, 1905.

TRIAL.

### BLACK v. WIEBE.

*Mechanics' Liens—Action to Enforce—Owner—Contractor—Amount Due—Completion of Building—Acceptance—Occupation—Terms of Contract—Reference—Costs.*

Action to enforce a mechanic's lien.

H. A. Robson and J. R. Haney, for plaintiffs.

G. A. Elliott and B. L. Deacon, for defendant Hiebert.

PERDUE, J.—The defendants Wiebe and Jardine entered into an agreement with the defendant Kate Hiebert to erect for her a house on land belonging to her on Selkirk avenue, Winnipeg.

The agreement under which the work was to be done is contained in a written contract, to which the plans and specifications of the building are attached, forming a part of the agreement. The contract price was $2,600, payable $30 on execution of the contract, $470 when the roof of the building was covered in, $1,500 "on or before the completion of the building," and the balance as should be arranged between the parties. The $1,500 was to be raised by a loan on the premises, the contractors to receive an order for the proceeds of the loan.

The plaintiffs supplied the lumber for the erection of the house and also for the erection of a barn upon the same lot.



Digitized by Google

The lumber was supplied upon the order of the contractors, and pursuant to an arrangement made between them and the plaintiffs.

The house is, and has been for some time, occupied by Mrs. Hiebert, but it has never been fully completed. The specifications have been departed from in certain particulars, with the assent, as it is alleged, of the proprietress. I am not satisfied that her assent was given to all the changes, but, however this may be, it is clear that the quality of the work and material are not in accordance with that prescribed by the contract. Although it was alleged that a stone foundation had been put in as an extra, the evidence shews that the building as it stands is, owing to defects, not worth more than $2,000.

A mortgage for $1,000 was placed on the property, and the proceeds of this appear to have been applied on the contract. The plaintiffs received a portion of these proceeds, and the balance remaining unpaid is $321.66. Part of the lumber supplied by the plaintiffs went into the construction of the barn.

The plaintiffs' lien did not include the barn, but only referred to material used in the erection of the house. The value of the lumber used for the barn was $100, leaving $221.66 as the amount proved by the plaintiffs under the lien. Several other liens have also been filed by various parties.

It is urged on behalf of the owner that, as the house has never been completed, there is nothing due to the contractors, and that sub-contractors are, under sec. 8 of the Mechanics' and Wage-Earners' Lien Act, limited to the amount owing to the contractors.

Section 12 of the Act introduces special provisions for the protection of wage-earners, and provides for the enforcement of a lien in their favour in respect of a contract not completely fulfilled. It also provides that in such cases the wage-earners may enforce their liens against the percentage required to be retained by the proprietor, and this percentage shall, in the case of a contract not completely fulfilled, be calculated on the work done or materials furnished by the contractor.

The insertion in the Act of the provisions contained in sec. 12 shews that the protection extended to a lien-holder of giving him a right to enforce his lien, derived through a contractor, where the contractor has not fulfilled the contract, is limited to claims for wages.

Digitized by Google

Where, however, the money is payable under the contract by instalments as the work progresses, the general lien-holders may enforce their liens to the extent of the instalments earned in so far as the same remain unpaid in the hands of the proprietor: Brydon v. Lutes, 9 Man. L. R. 463.

It was urged on behalf of the plaintiffs that the owner had accepted the work by occupying the house and by mortgaging the same.

It is clear that the mortgage was in pursuance of a term in the contract in order to raise money to pay the contractors, and that this was done during the progress of the construction. The giving of the mortgage could not therefore be taken as an acceptance of the whole work. There is a wide difference between the receiving and retaining of a chattel and the occupation of a building erected upon the land of the occupant, in respect of the inference of acceptance from the act of the party. This has been clearly pointed out in Pattinson v. Luckley, L. R. 10 Ex. 330, Sumpter v. Hedges, [1898] 1 Q. B. 673, and other cases.

The building, although incomplete and unsatisfactory, is upon the owner's land and is perhaps partly paid for. The owner may, although protesting against its incomplete or unsatisfactory state, be compelled to use and occupy it unless he abandons his land until the dispute is settled. Occupation under these conditions should not be construed as an acceptance.

The contract in this case provided that $30 should be paid on execution of the instrument, and this payment has been made. The second payment of $470 was to be made when the roof was covered in.

This payment became due, and the contractors received on account of it the equivalent of $200, leaving the sum of $270 still due and available for lien-holders. The proceeds of the mortgage were not applicable on this, but on the $1,500, under the terms of the contract.

The further sum of $1,500 was payable "on or before the completion of the building." As the owner had the option of paying this sum either before the completion of the building or upon its completion, it is manifest that she is not legally compellable to pay the amount until the longer period had elapsed, and that payment cannot be enforced until the building has been completed.

The balance of the money was to be paid as should be arranged between the parties.

Digitized by Google

No arrangement having been made as to this, and the contract not having been performed, there is no present liability as to this on the part of the owner.

There will be judgment declaring the plaintiffs entitled to a lien on the land for the sum of $221.66 in respect of the sum of $270 due and payable by the defendant Kate Hiebert.

There will be a reference to the Master to inquire as to other lien-holders entitled to share in the said sum of $270 and as to other incumbrancers upon the land; to take accounts of the claims of such lien-holders and incumbrancers and to settle the priorities of the parties. A time for redemption not less than three months from the making of the report is to be appointed by the Master, and in default of payment by the defendant Kate Hiebert of the aforesaid sum of $270 and the costs hereinafter mentioned within the time limited, the land is to be sold as the Master shall direct, and the proceeds applied as to $270 thereof towards payment of lien-holders pro rata. The balance is to be applied in payment of other incumbrancers establishing claims, according to their priority, and any balance then remaining to be paid to the owner.

The plaintiffs shall be entitled to their costs down to and including the trial and entry of judgment, but such costs shall not exceed 25 per cent. of the sum of $270, besides actual disbursements.

The plaintiffs shall be entitled to the sum of $20 for conducting the proceedings in the Master's office in addition to actual disbursements, and each lien-holder or incumbrancer establishing a claim shall be entitled to the sum of $5, besides his actual disbursements, for costs of proving such claim.

The costs above mentioned shall be added to the said sum of $270 and become part of the moneys which the defendant shall be liable to pay, and with which the said land shall be chargeable. On the moneys being realized such costs shall be paid to the party entitled to the same.

In case a sale is necessary the plaintiffs shall be entitled to the sum of $20 as their costs for conducting the same, besides actual disbursements, and these last mentioned costs shall be added to the plaintiffs' other costs and be payable out of the proceeds of the sale.

Digitized by Google

## MANITOBA.

PERDUE, J. FEBRUARY 4TH, 1905.

CHAMBERS.

### RE AYOTTE.

*Contempt of Court—Inquiry before Magistrate—Refusal of Witness to Answer Question—Relevancy—Erasing Name from Voters' List—Dominion Election—Returning Officer—From whom List Received.*

Application for a writ of habeas corpus for the release of Alexander Ayotte, confined in the gaol of the Eastern Judicial District.

T. G. Mathers and E. L. Howell, for the applicant.

A. J. Andrews and H. W. H. Knott, for the Crown and the convicting magistrate.

PERDUE, J.—By arrangement between counsel the whole question as to the validity of the committal of the applicant was argued on the application for the writ.

An information was laid against one William Kittson, charging that he on or about 3rd November, 1904, at the town of St. Boniface, in the province of Manitoba, being a deputy returning officer for polling division 43 of the electoral division of Provencher at the election of a member of the House of Commons of Canada for said electoral district, taking place on 3rd November, 1904, unlawfully and wilfully erased, or caused to be erased, the name of Charles Charbonneau from the lists of voters for said electoral district for use in said election, according to the Dominion Election Act.

On the preliminary investigation of this charge before A. McMicken, police magistrate, the present applicant, Alexander Ayotte, was called as a witness. Ayotte deposed that he was the returning officer for the district of Provencher at the election in question, and proved the fact of the election having been held, the names of the candidates, and other formal matters. He stated that he had received from Ottawa the voters' lists, but could not tell by what means they had come. He was then asked: "From whom did you receive them?" Objection to this question, on the ground that it was irrelevant, was taken by Mr. Mathers, who was acting as counsel for the accused, Kittson, and also for Ayotte on a similar charge pending against him. The witness then re-

Digitized by Google

fused to answer the question. The examination of the witness was proceeded with further, and he stated that when he first received the lists there were red lines struck through the names of persons on the list. Mr. Andrews again asked from whom the witness received the list. The magistrate ruled that that question was relevant, but the witness refused to answer. The magistrate then committed Ayotte to gaol for seven days under sec. 585 of the Criminal Code, for contempt in refusing to answer. The above section of the Code provides that when a witness refuses to answer such questions as are put to him without offering any just excuse for such refusal, the justice may adjourn the proceedings and may in the meantime commit the witness so refusing to gaol.

The words used in the section are "refuses to answer such questions as are put to him," but the form of the warrant of commitment referred to in the section contains the words "now refuses to answer certain questions concerning the premises which are now here put to him." To justify a magistrate in committing a witness under this section it must appear not only that the witness refused without just excuse to answer, but that the question asked was in some way relevant to the issue. "Facts relevant to the issue are facts which tend either directly or indirectly to prove or disprove a fact in issue, or some relevant fact. Thus, facts which constitute a link in the chain of proof, or affect the credit of a witness, or the admissibility of a document, are relevant:" Phipson on Evidence, p. 43. How then was the question put to the witness relevant to the inquiry in this case? Upon the argument it was admitted that the voters' list furnished by the returning officer to Kittson, the deputy returning officer, had not been found amongst the papers returned by the Clerk of the Crown in Chancery, and was not, therefore, produced on the inquiry. If the list in question had been produced, it might have been identified by the witness as the list forwarded by him to the deputy, and the inquiry made under the information would have to be confined to ascertaining whether the accused had after receiving it made alterations in it.

Under the provisions of the Franchise Act, 61 Vict. ch. 14 (D.), as amended, the provincial voters' lists are adopted for the purpose of Dominion elections. Certified copies are sent by the provincial authorities to the Clerk of the Crown in Chancery. These certified copies are deemed to be the original lists, and from these the King's printer prints the lists for Dominion elections. All voters' lists printed by the King's printer shall be authenticated by his imprint, and

Digitized by Google

every copy of a voters' list bearing such imprint shall be deemed to be for all purposes an authentic copy of the original list of record in the office of the Clerk of the Crown in Chancery (sec. 10, sub-sec. 6). By sub-sec. 7 of sec. 10, if, under the provincial law, any changes have been made in a list of voters since final revision, the official having a record of such changes, shall, at the request of any person presenting for the purpose such printed copy of the list, make corresponding changes in and additions to such printed copy and certify the same, and such printed copy, with the changes, shall be deemed to be for all purposes an authentic copy of the list of voters.

By the Dominion Elections Act, 63-64 Vict. ch. 12, sec. 21, immediately after the issue of the writ of election, the Clerk of the Crown in Chancery shall transmit to the returning officer a sufficient number of copies of voters' lists, "if there are any." By sec. 22, the returning officer shall obtain from the proper officers certified copies of the proclamations, etc., defining provincial polling division, "and such provincial voters' lists or certified copies thereof or extracts therefrom as he requires in addition to the lists supplied by the Clerk of the Crown in Chancery."

"Upon a poll being granted, the returning officer shall furnish each deputy returning officer with one copy of the voters' list, if there is one, for the polling division for which he is appointed, such copy of the voters' list being first certified by himself:" sec. 41, sub-sec. (c).

The information which is laid against Kittson, under sec. 503 of the Criminal Code, can only refer to a charge of having erased a name in the certified copy of the voters' list delivered to him by the returning officer. The printed copy of the list forwarded by the Clerk of the Crown in Chancery may not have included a list of the voters for the division in question, in which case the returning officer would have been under the necessity of procuring a list from the provincial authorities. The lists received from Ottawa may even be amended by the provincial officials so as to shew subsequent changes. It can therefore be only the list furnished to Kittson by the returning officer and certified to by the latter that can be made the subject of the inquiry now pending before the magistrate. It is this which determines who shall vote in the polling division (sec. 64, sub-sec. 3). The changes or erasures made in the list before it reached Kittson's hands cannot affect him so far as the charge laid in the information is concerned, and the question from whom the returning officer received the lists in the first place would be irrelevant

Digitized by Google

to the issue. If the matter rested there I should be compelled to hold that the question was immaterial and that Ayotte should not have been committed for refusal to answer.

But the very important fact, so far as this application is concerned, transpired on the argument that the voters' list in question was not forthcoming, and that secondary evidence of its contents might have to be given.

Although the statement of Ayotte that when he received the list erasures of the names of persons had already been made in it, tends to disprove the charge against Kittson, the prosecutor is not bound to rest satisfied with this, and may pursue the inquiry further. If he decides to do so, he must, as an essential part of his case, prove, either by the production of the list furnished to the deputy returning officer, or by secondary evidence, that it contained the name of Charbonneau and that this name was erased after the deputy received it. Proving the contents of the list may necessarily involve as a part of the chain of proof information as to the source from which the returning officer obtained the lists, and whether the list for this particular polling division was furnished by the Clerk of the Crown in Chancery or by a provincial officer. In this view of the matter I am not prepared to hold that the question was immaterial.

In refusing to answer the question, the witness acted under advice, and in the bona fide belief that it was not a question that he should be called upon to answer. If he consents to answer the magistrate should at once, under the terms of the warrant, order his release.

The application for a writ of habeas corpus is refused. I make no order as to costs.

[The returning officer agreed to answer the question put, and was released.]

---

## BRITISH COLUMBIA.

### (VANCOUVER.)

MORRISON, J. FEBRUARY 3RD, 1905.

### CARTWRIGHT v. THE KING.

*Particulars—Laches—Defence to Petition of Right.*

Application by the suppliant for an order for particulars of laches alleged generally in the defence.

A. C. Brydon-Jack, for the suppliant.

Digitized by Google

A. J. Kappele, for the Crown, opposed the application on the ground that the suppliant's petition disclosed a lapse of time which was sufficiently indicated without the defence giving the dates.

MORRISON, J., held that the Crown must give the dates of the particular laches referred to in the defence, on the ground that the suppliant is entitled to know specifically the laches relied upon by the Crown. Costs to the suppliant in the cause.

---

## NORTH-WEST TERRITORIES.

### (NORTHERN ALBERTA.)

SCOTT, J. JANUARY 6TH, 1905.

TRIAL.

## GRIERSON v. JOHNSTON.

*Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Partnership Land—Authority of one Partner to Sell—Statute of Frauds—Description of Land—Mutual Mistake — Dominion Lands Act — Interest in Homestead—Want of Mutuality.*

Action for specific performance of a contract for the sale of land.

O. M. Biggar, Edmonton, for plaintiff.

J. R. Boyle, Edmonton, for defendant.

SCOTT, J.—For some time prior to 1st April, 1901, defendant and one Eldon were carrying on business in partnership as restaurant-keepers in Edmonton. The partnership between them was continued until the death of Eldon, which took place in the latter part of that year.

On 1st April, 1901, defendant Eldon entered into an agreement in writing with one McKay to purchase from him 60 acres of land therein described. This agreement purports to be made between McKay, of the first part, and defendant and Eldon, who are described as doing business under the firm name of "Johnston & Eldon," and was signed by both defendant and Eldon.

Digitized by Google

On 5th November, 1901, plaintiff paid Eldon the sum of $5 on account of the purchase money of the lands mentioned in the statement of claim, and received from Eldon the following memorandum, signed by Eldon in the name of his firm:

"Edmonton, 5th November, 1901.

"Received from Edward D. Grierson the sum of $5 on account of purchase price of legal sub-divisions 15 and 16 of section 16 in township 53, in range 24 west of 4th meridian, Alberta, 60 acres at $11 per acre, payable $200 cash, and the balance, $60, in two months, other payments of balance to be according to agreement from Hugh McKay to Eldon & Johnston.

(Signed) "Johnston & Eldon."

In the agreement between McKay and defendant and Eldon, the lands comprised are described by metes and bounds, but the description corresponds to the northerly three-quarters of legal subdivisions 15 and 16 of section 16 mentioned in the statement of claim. In the agreement between plaintiff and defendant and Eldon above set out, they are described as legal subdivisions 15 and 16 of the same section, while the lands in respect of which specific performance is sought are legal subdivision 15 and the north half of legal subdivision 16 of the same section.

At the time the agreements referred to were entered into, McKay was entitled to the whole of legal subdivision 15 and the north half of legal subdivision 16, as part of the homestead entered for him under the provisions of the Dominion Lands Act, but he had not then been recommended for a patent. He obtained that recommendation in February, 1902. It does not appear that he ever had any interest, either under the Dominion Lands Act or otherwise, in the south half of legal subdivision 16; in fact, it appears that it was owned by plaintiff at the time of the agreement between plaintiff and defendant and Eldon.

I hold that the purchase by the defendant and Eldon from McKay was a purchase for and on account of the partnership. My reasons for so holding are: that in the agreement with McKay they are styled as partners; that defendant admits that Eldon's intention in buying the land was to raise vegetables for the restaurant; that there was no dissent on his part; and that, in a statement respecting the partnership estate furnished by defendant to the advocate of the per-

Digitized by Google

sonal representatives of Eldon, he refers to the McKay purchase as "the firm's interest in the H. McKay farm which we agreed before Mr. Eldon's death to sell to E. D. Grierson for $260."

I also hold that, even if the lands were not acquired on partnership account, Eldon was duly authorized by defendant to sell to plaintiff. The evidence shews that a few days prior to the agreement defendant was endeavouring to sell them to plaintiff upon the same terms; that he assented to the sale made by Eldon; that, if he was not actually present at the time Eldon signed the memorandum of sale, he knew that Eldon was making the sale; that immediately after it was made he saw the entry made by Eldon in the firm's books of the receipt of the $5 on account of the purchase money, and made no comment upon it; and that his conduct for a long time after the sale was consistent only with knowledge and assent on his part.

It was contended on the part of defendant that the memorandum under which plaintiff claims, is insufficient to satisfy the Statute of Frauds.

I have shewn that the lands described in the agreement are not identical with those in respect of which specific performance is sought, but there can be no question on the evidence that the lands which defendant and Eldon intended to convey were those which they were purchasing from McKay, or that the lands which McKay intended to convey and which they intended to purchase were those portions of legal subdivisions 15 and 16 which formed part of his homestead. That such was the intention of both McKay and defendant, appears from the fact that the former transferred them to defendant under his agreement, and defendant accepted the transfer under it. There was, therefore, a mutual mistake on the part of plaintiff and defendant. Such a mistake does not disentitle plaintiff to specific performance. See Fry on Specific Performance, secs. 793 et seq., 811 et seq., and 818. If necessary so to do, the Court will reform the agreement to correspond with the intention of the parties.

Apart from the question of the mistake in the agreement, I cannot see that the memorandum is insufficient to satisfy the statute. It was urged that the intention of the parties was that a further and more complete agreement should be entered into, but that intention cannot be gathered from anything contained in the memorandum, nor is there any evidence to shew that it existed.

Digitized by Google

It was also contended that the agreement between plaintiff and defendant and Eldon is void by virtue of sec. 42 of the Dominion Lands Act, as it is in effect merely an assignment of the interest of the latter in the agreement with McKay, which was void under that section.

The agreement appears to me to be something more than an assignment of the interest under the McKay agreement. It is an agreement to sell the land absolutely, and the McKay agreement was referred to merely for the purpose of ascertaining the terms of payment. Even if it were construed as merely such an assignment, I cannot see that that section has the effect of rendering void an assignment of an agreement which is void under it.

A further objection urged against plaintiff's right to obtain the relief sought, is, that not having signed the agreement he is not bound by it, and if sued upon it he could set up the Statute of Frauds as a bar to the action; that there is therefore want of mutuality, and, such being the case, specific performance should not be directed. There is, however, abundant authority against this contention: see Fry on Specific Performance, secs. 470, 515, and cases there cited.

It is shewn that McKay afterwards obtained a title to the property in question, and transferred it to defendant, and that plaintiff has already obtained from the personal representative of Eldon a transfer of his interest therein; also that before action plaintiff tendered to defendant the sum of $131.35 on account of the purchase money, but defendant refused to accept the same or to carry out the sale.

I hold that plaintiff is entitled to specific performance of the agreement set out in the statement of claim in respect of the lands described in the statement of claim, to an injunction restraining the defendant from selling or dealing with same, and to a conveyance for the same from defendant on payment into Court of the balance due defendant on the purchase money.

There will be a reference to the deputy clerk at Edmonton as to the title and to ascertain the amount due to defendant in respect of the purchase money.

Plaintiff will have the costs of the action.

Digitized by Google

## NORTH-WEST TERRITORIES.

### (EASTERN ASSINIBOIA.)

WETMORE, J. FEBRUARY 2ND, 1905.

CHAMBERS.

## REX EX REL. PARK v. STREET.

*Municipal Elections—Controverted Election—Summons in Nature of Quo Warranto—Relation—Requirements of—Acceptance and Oath of Office—Term for which Respondent Elected.*

Upon the application of the relator, a writ of summons in the nature of a quo warranto was issued to try the matter of the election of the respondent as mayor of the town of Whitewood.

The respondent appeared and raised preliminary objections to the issue of the writ as follows: 1. That the statement or other material filed did not disclose the fact that the respondent had accepted the office or taken the necessary oath of office. 2. That it did not disclose the term for which the respondent was elected.

E. L. Elwood, Moosomin, for the relator.

J. T. Brown, Moosomin, for the respondent.

WETMORE, J.—I am of opinion that these objections are not well taken. The writ in question was issued under the provisions of sec. 56 of the Municipal Ordinance, ch. 70 of the Revised Ordinances. It is quite clear to my mind that the object and intention of that writ is entirely different from that of the common law writ of quo warranto, or from an information in the nature of a quo warranto filed under the ordinary practice relating to such matters. In Short & Mellor's Crown Practice, p. 279, it is set out that "the ancient writ of quo warranto was in the nature of a writ of right for the King against him who claims or usurps any office, etc., to inquire by what authority he supports his claim in order to determine his right. That writ is now obsolete, and the modern information in the nature of a quo warranto is now used and has the same object in view as the writ." If we turn to p. 601 of this same book we find the form of an information in the nature of a quo warranto against municipal corporate officers: "And it is alleged that the party against

Digitized by Google

whom the information is laid did use and exercise and continued at the time of the laying of the information to use and exercise the office without legal warrant or right," etc. Under such a practice I can well understand that the material should disclose the fact that the party against whom the information was laid was at the time the information was laid exercising the functions of the office, and it was upon that practice that The Queen v. Slatter, 11 A. & E. 505, and The Queen v. Quail, ib. 508, were decided.

The writ issued under sec. 56 of the Municipal Ordinance is not issued merely to inquire by what right the respondent holds or exercises the office, but it is to try out the validity of the election. In the first place, that section and the following sections down to and inclusive of 82 are headed "Controverted Elections." Section 56 provides that "if within the specified period a relator shews by affidavit to a Judge reasonable grounds for supposing that the election was not legal, or was not conducted according to law, or that the person elected therein was not duly elected, or was guilty of bribery or undue influence, the Judge shall direct a summons in the nature of a quo warranto to be issued." Then sec. 57 provides that "in case the relator alleges that he himself or some other person has been duly elected, the writ shall be to try the validity both of the election complained of and the alleged election of the relator or other person." Then sec. 75 provides that "any person whose election is complained of may disclaim the office and all defence of any right that he may have to the same." All these provisions clearly shew that the object of the writ is not merely to try the right of the person in possession, but to try the validity of the election.

The observations of Burns, J., in The Queen v. Stephenson, 1 C. L. Ch. at p. 271, are pertinent, and I entirely concur with them.

The statement filed in this matter contains all that sec. 56 of the Ordinance requires, and no more seems to me to be required. It will be observed also that the form of writ prescribed by the Rules of the Supreme Court, Consolidated Rules, p. vi., commands the respondent to appear on the proceeding instituted to try the validity of his election, not to inquire by what right he exercises the office. Evidently in drawing this form of summons the Judge must have seen the distinction between the writ required by the Ordinance and the old writ of quo warranto or the information in the nature of a quo warranto.

Digitized by Google

As to the other ground, that the statement or material filed does not disclose the term for which the respondent was elected, in view of what I have held, that is not material. The questions are: Was there an election? Was the respondent declared elected at such election? And was that election valid? The objections are therefore overruled.

---

## NORTH-WEST TERRITORIES.

JANUARY 20TH, 1905.

SUPREME COURT IN BANCO.

### REX v. CANADIAN PACIFIC R. W. CO.

*Constitutional Law — Powers of Territorial Legislature—Prairie Fire Ordinance—Intra Vires—Canadian Pacific Railway—Conviction—Evidence as to Cause of Fire.*

Application by defendants to quash their conviction by a justice of the peace, under the Prairie Fire Ordinance, for starting a fire in the neighbourhood of Kincorth, a station on the line of railway owned by defendants.

The motion was heard by SIFTON, C.J., WETMORE, SCOTT, PRENDERGAST, and NEWLANDS, JJ.

J. A. M. Aikins, K.C., for defendants.

Horace Harvey, for the Attorney-General, the magistrate, and the informant.

SIFTON, C.J.—A number of grounds of objection were stated, of which, however, only two were relied upon at the argument:—

1st. That there was no evidence to support conviction.

2nd. That the Prairie Fire Ordinance, in so far as it purports to affect or bind the Canadian Pacific Railway Company, is ultra vires.

As to the first objection, I think the proper rule is, that, if there is any evidence to justify a conviction, it is for the justice of the peace to decide as to the weight, practically in same manner as a jury, and that his finding should not be interfered with except it clearly appears that there was no evidence before him, which can hardly be argued in this case. The evidence is practically all given by employees of defendants, and shews that just after the passing of engines

Digitized by Google

of defendants the fire was seen first by three different employees of defendants; that a wind was blowing from the south-west; that the fire burned from a point inside the right of way to a distance of several miles north of the track; that these employees, whose duty it would be to look after the interests of the company, and one at least of whom was specially charged with the duty of preventing spread of fires, and was in special charge of the section of the track in the neighbourhood of this fire, and who swears he was the first man at the fire, saw nobody in the neighbourhood who could have started it; and the magistrate having deduced therefrom that the fire necessarily was caused by sparks from one of the engines previously mentioned, I do not feel justified in saying he had no grounds for such deduction.

As to the second ground, I have no hesitation in saying that if the Ordinance should be construed as compelling the railway company to carry on their undertaking in a manner different from that contemplated by the Dominion statutes incorporating the company, in laying upon the company burdens not made a part of their duty by that Act, or the General Railway Act, it would be ultra vires; but this does not to me appear a necessary construction of the Ordinance, which, so far as this case is concerned, only appears to govern the procedure and rules of evidence, and shifts upon defendants in certain cases the burden of proof of the existence or non-existence of certain matters, which ordinarily without the Ordinance might have to be proved by the plaintiff, and to this extent I think the Legislature was clearly within its rights in enacting said Ordinance.

I therefore think that the motion to quash should be disallowed and the conviction affirmed.

WETMORE, J.—Defendants were convicted . . . of the offence of kindling a fire and letting it run at large on land not the property of the company, and application was made to this Court to quash the conviction. . . . The company were served with a summons to attend before the justice, but did not attend, and the charge was tried ex parte. The fire in question took place about two miles east of Kincorth station and was first observed somewhere between 10 and 11 o'clock on the morning of 15th October, 1903. Not very long before the fire was discovered, two engines belonging to defendant company passed, going east from Kincorth station. One left the station at 9.30 in the morning and the other at 10.35. The first notice that the witnesses had of the fire was seeing the smoke. The persons who testified to

Digitized by Google

seeing the fire, and who went to see where it was, first saw this smoke from a distance of about one mile and a half or two miles. By the time they got there, the fire had extended a considerable distance north. There was a strong wind from the south-west. An old fireguard had been ploughed on the north side of the track, and the newly burned ground extended from within this fireguard northwards. One of the witnesses stated that he judged it started from the track. This old fireguard had been ploughed, but it had been allowed to grow up with weeds and grass, so that it was of no use whatever as a fireguard, and there was no other fireguard.

The first objection taken to this conviction was, that there was no evidence that the fire originated from the defendants' engine. I am of the opinion that there was evidence to warrant the justice in coming to the conclusion that this fire did so originate. . . .

[Reference to Smith v. London and South Western R. W. Co., 40 L. J. C. P. 21; New Brunswick R. W. Co. v. Robinson, 11 S. C. R. 688; Freemantle v. North Western R. W. Co., 10 C. B. N. S. 80; Rainville v. Grand Trunk R. W. Co., 25 A. R. 242.]

Now in the case under consideration, although no person at the time the fire originated was actually at the place where it began, the smoke was noticed by the witnesses I have referred to, who were the telegraph operator at Kincorth, the pump man of the company who was on duty that day at Kincorth, and the section foreman of the defendant company stationed at Kincorth, and whose section ran three miles and a half east of Kincorth, and who at the time of the fire was at the east end of his section and saw the fire about a mile and a half west of where he was working. These men all saw the fire shortly after the engines went by, and immediately proceeded to the place and discovered what I have stated, and there is no evidence that any fire had been seen there before the engines went by. This is sufficient to warrant a prima facie finding that the fire originated from sparks, at any rate from one of the engines, and I am inclined to think from the last one. It is immaterial, however, which of the two engines started the fire.

The Prairie Fire Ordinance, C. O. ch. 87, provides by sec. 2 that "any person who shall either directly or indirectly, personally or through any servant, employee or agent, kindle a fire and let it run at large on any land not his own property shall be guilty of an offence and shall on summary con-



Digitized by Google

viction thereof be liable to a penalty." An Ordinance passed in 1903 (ch. 25) amends sec. 2 of the original Ordinance by adding a sub-section, which is as follows: "If a fire shall be caused by the escape of sparks or any other matter from any engine or other thing, it shall be deemed to have been kindled by the person in charge or who should be in charge of such engine or other thing, but such person or his employer shall not be liable to the penalties imposed by this section if in the case of stationary engines the precautions required by section 12 have been complied with, and there has been no negligence in any other respect, or, in the case of a railway or other locomotive engine, such engine is equipped with a suitable smoke stack netting and ash pan netting in good repair and kept closed and in proper place, and in case of railway engines where the line of railway passes through prairie country, there is maintained for a distance of at least three miles continuously in each direction from the point at which the fire starts on each side of said line of railway, and not less than 200 or more than 400 feet therefrom, a good and sufficient fireguard of ploughed land not less than 16 feet in width, kept free from weeds and other inflammable matter, and the space between such fireguard and such line of railway kept burned or otherwise freed from the danger of spreading fire, and there has been no negligence in any other respect."

Section 8 of the principal Ordinance provides that "it shall not be necessary that any prosecutor or complainant shall, in any information or complaint for an offence under this Ordinance, negative any exemption, exception, proviso, or condition herein contained, or prove any such negative at the hearing or trial, but the accused person may prove the affirmative thereof in his defence if he wishes to avail himself of it." The requirement in the Ordinance of 1903 is an exemption or exception from liability in case the fireguards, so far as this company is concerned, were made and maintained as required, and in case the locomotive engine was equipped with a suitable smoke stack netting and ash pan netting in good repair and kept closed and in proper place, and if this legislation is valid, it was not incumbent on the informant to prove the negative herein mentioned. It was incumbent on the company to prove that proper fireguards were made and that the locomotive engine was equipped and kept as required. As stated, the company did not appear. It was established, however, affirmatively that the fireguards were not properly maintained because they were not sufficient. It was urged that these provisions were ultra vires of

Digitized by Google

the Legislative Assembly; that such an Assembly had no power to impose duties or obligations on this company, which was constituted and its powers and duties prescribed by Act of Parliament. In so far as the casting of the duties upon them to maintain the fireguards is concerned, I have very great doubts whether that was within the power of the local legislature. But, assuming that it was not, it does not to my mind settle the question, for I am of opinion that it did lie within the power of the local legislature to require that the company's engines should be equipped in the manner prescribed and the netting kept closed and in the proper place. That did not cast upon the company any new obligation; it was their duty at common law to have these appliances properly equipped and kept so that the least possible danger from sparks could ensue, and the Ordinance simply provided that they should perform their common law duties, and if they did not they should be liable for the consequences in a penalty. It is true that the Ordinance threw upon the company, in case of procedure for an offence of this nature, the onus of establishing that they had the appliances and that they were in proper condition. It was within their powers and reasonably so, because the servants of the company as a rule would be the best informed persons to establish that fact, and in many instances would be the only persons available to do so. I am of the opinion that the power to so legislate would come under the authority given to the Territories to legislate upon all matters of a merely local or private nature, and also the power given to legislate in respect of property and civil rights in the Territories. Prairie fires, we all know, are liable to be most disastrous in their consequences, not merely in the matter of an injury done to the individual, but in many cases the whole district is laid waste, and not only is the grass destroyed, but grain housed and hay stored away for winter use are not infrequently swept away, and in order to preserve properties of this sort from this danger, I am of opinion that the Assembly could practically say to this railway company, "You must use your engines in the manner you are allowed to use them at common law, and if you do not you are liable to a penalty." That merely makes them liable to a penalty because they do not observe their common law duties, and in doing so they are not casting any additional duties upon the company other than what they were bound to observe before. This is legitimate legislation in the direction of preserving the property of the inhabitants of the Territories, and, in addition to that,

Digitized by Google

is entirely of a local nature. I am of opinion that this holding comes within the principle laid down by the Judicial Committee of the Privy Council in Canadian Pacific R. W. Co. v. Corporation of the Parish of Notre Dame de Bonsecours, [1899] A. C. 367. . . .

I am therefore of opinion that a prima facie case was established against the defendants, which warranted the justice in convicting, and that the motion should be refused.

SCOTT, PRENDERGAST, and NEWLANDS, JJ., concurred.

---

## BRITISH COLUMBIA.

### (VANCOUVER.)

MORRISON, J. FEBRUARY 6TH, 1905.

CHAMBERS.

### RE DUNDASS AND MUNICIPALITY OF CHILLIWACK.

*Liquor Licenses—Municipal By-law — Validity — Powers of License Commissioners—Wholesale License — Discretion — Mandamus—Practice—Summons or Motion.*

Application by David P. Dundass for a mandamus to compel the board of license commissioners of the municipality of Chilliwack to grant to him a wholesale liquor license within the municipality.

The applicant had applied for a retail liquor license and been refused, and he then applied for a wholesale license, and tendered the required fee to the collector, who referred him to the board of license commissioners to obtain an order. This order was refused by the board of license commissioners, and the only reason given for the refusal, as appeared in the minutes of the meeting, was that he had previously applied for a retail license and been refused.

A. D. Taylor, for the applicant.

A. R. Grant, for the municipality, took the preliminary objection that the application was made by summons instead of by motion, citing Rule 561, which reads as follows: "Application for a prerogative writ of mandamus shall be

Digitized by Google

made by motion on affidavit for a rule calling on the party required to do the act to shew cause why a mandamus should not issue."

Taylor, in reply, cited Rule 21, of the Crown Rules as prepared under sec. 533 of the Criminal Code, which reads as follows: "Application for a prerogative writ of mandamus shall be made to a Judge at Chambers by a summons to shew cause."

MORRISON, J., held that the proper process was by summons.

By the Municipal Clauses Act, R. S. B. C. ch. 144, sec. 171, sub-sec. 4, "Every municipality shall, in addition to the powers of taxation by law conferred thereon, have the power to issue licenses for the purposes following; . . . and to levy and collect by means of such licenses the amounts following; . . . from any person not having a retail license as above, and vending spirituous or fermented liquors by wholesale, that is to say, in quantities of not less than two gallons for each house or place, not exceeding $75 for every six months."

In pursuance of this power the municipality of Chilliwack had passed a by-law for the regulation of the issuance of licenses, one clause of which read as follows: "All licenses granted under the authority of this by-law, shall be issued by the collector of the municipality, provided always that no license for the sale of liquors shall be issued except by order of the board of license commissioners."

Taylor, for the applicant, argued that the by-law was ultra vires in that it imposed no restrictions whatever, but delegated to the board of commissioners full power to refuse a license of any kind whatever, not limiting them to any specified restrictive conditions; that the by-law had thus gone beyond the Act. Since the by-law imposed no restrictions whatever, only those contained in sec. 202 of the Municipal Clauses Act could apply, as the by-law could not go beyond the statute; that therefore sub-sec. (b) was the only restriction on which the board of commissioners could properly refuse the issuance of a license:—"The council of every municipality may pass by-laws, not however contrary to or inconsistent with the conditions of this Act, for limiting the number of licenses for hotels, saloons, stores, and restaurants to be issued or granted in the municipality." The reason for refusal given by the board was insufficient and not in any way authorized by the statute. The failure to

Digitized by Google

impose restrictions in the by-law operated as a general delegation of unlimited powers, and the by-law was therefore bad in that respect: Merritt v. City of Toronto, 22 O. R. 205.

Grant, not called on.

MORRISON, J., held that the by-law was valid, and that it was the proper function of the licensing board to decide whether or not a wholesale license was necessary, and whether the individual applicant was a fit and proper person to receive a license; that the legislature must be presumed to have given a discretionary power to the municipality and the people living in any given community as to whether particular persons should be allowed to deal in such a dangerous commodity or not, and if they saw no necessity for a wholesale liquor license to be granted in their municipality, the board of the municipality had full right or power to refuse it. nor could it be successfully urged that the fact that the applicant had been refused a retail liquor license was a bad and insufficient reason for refusing him a wholesale liquor license. They may have considered the applicant an unfit or improper person to receive a retail license, and consequently might be of the same opinion regarding the issuance of the wholesale license to him, and, unless counsel satisfied the Court that such was not the case, the desired order would not be made, or the discretionary power as exercised by the municipality to refuse such a license would not be interfered with.

The fact that the municipality of Chilliwack was a rural municipality should not be lost sight of, and it was difficult to see what it could possibly want with a wholesale liquor license.

Digitized by Google

THE

# Western Law Reporter

VOL. I. TORONTO, MARCH 1, 1905. No. 8.

## NORTH-WEST TERRITORIES.

### DAVIES v. CANADIAN-AMERICAN COAL AND COKE CO.

*Correction.*

In the report of this case, ante 55, there is a mistake on p. 67. The sentence beginning on line 7 from the top should read as follows: "The question of contributory negligence only arises when negligence from the omission of some statutory or common law duty arises on the part of defendants, and, if contributory negligence exists, that affords a matter of defence notwithstanding the original negligence or want of duty on the part of defendants."

---

## BRITISH COLUMBIA.

### (VICTORIA.)

MARTIN, J. JANUARY 19TH, 1905.

TRIAL.

### JACKSON v. DRAKE.

*Account Stated—Agreement not to Sue—Further Adjustment of Accounts—Recovery on one Item of Account—Absence of Alternative Claim on Items—Refusal to Amend.*

Action by a solicitor against a firm of solicitors of which the plaintiff had been a member to recover $16,595.10, the amount of an account stated.



Digitized by Google

The defence was that it was agreed between defendants and plaintiff that a certain sum was due the firm by various clients, and that when the whole of such moneys so due was collected, the sum of $16,595.10 would be due by defendants to plaintiff; that until such moneys were collected no part thereof was payable to plaintiff; and that no part of the sums then due to the firm had been collected; and also that the account was signed by defendants in mistake and through the misrepresentation of plaintiff, who assured them that in any event he would not sue upon the account.

W. J. Taylor, K.C., and C. J. Prior, for plaintiff.

F. Peters, K.C., for defendants.

MARTIN, J., found as a fact that plaintiff obtained the signatures of defendants Helmcken and Aikman to the account on the representation that it was not to be used as a document upon which an action was to be founded, i.e., that it was not the intention that it was to be regarded as a statement of an absolute liability, but a liability which depended upon the re-adjustment of the accounts of the partnership.

After hearing further argument in regard to the item of $790.60 a written judgment was delivered.

MARTIN, J.—After hearing further argument, I am of the opinion that plaintiff cannot get judgment for one item only out of the six composing this account stated; in other words, that this distinct cause of action is not severable. This precise question has never been raised before, so far as I can find, nor have counsel been able to cite an exact authority. It does not, however, seem unreasonable that where a party deliberately elects to stand or fall (as has been done here) on such a cause of action, he should be required to establish it like any other, and in such case there is no doubt about what must be proved: Robertson v. Bossuyt, 8 B. C. R. 301, 306. Manifestly, it would be erroneous to allow judgment to be recovered on, say, one correct item out of fifty composing an account stated. If that were to be allowed, a defendant would have to come prepared with evidence to meet not only the specific cause of action set up, but any cause of action that might arise out of every item mentioned therein.

The present situation is created by the fact that plaintiff has not taken that precaution in this form of action, which is, so far as my experience goes, and as numerous reported cases shew, adopted in practice, i.e., to sue on the ariginal debt as well as on the account stated, so that if he fail on the

Digitized by Google

special cause of action he may save himself on the original debt or debts due on the various items from which it is made up. And this has been the practice in Canada from an early date, as well as in England: Large v. Perkins, Tay. 62; and cf. Armitage v. Vivian, 2 Man. L. R. 360. In Hart v. Condon, 22 N. S. Reps. 334, an account stated, which wrongly included an amount for interest, was set aside as incorrect.

However, not only has the usual course not been adopted here, but the proffered amendment to overcome the objection has been refused; and, as the Court has no power to compel a party to accept an amendment of his pleadings against his will, all that can be done is to dismiss the action with costs.

---

## BRITISH COLUMBIA.

### (VICTORIA.)

HUNTER, C.J. FEBRUARY 8TH, 1905.

TRIAL.

## PEIRSON v. CANADA PERMANENT AND WESTERN CANADA MORTGAGE CORPORATION.

*Vendor and Purchaser—Contract for Sale of Land—Default in Payment of Purchase Money—Rescission of Contract—Time of Essence of Contract—Stipulation for Interest—Delay in Rescinding—Reasonable Period—Effect of Execution of Conveyance—Conditional Execution—Forfeiture—Costs.*

Action for specific performance of an agreement for the sale of land.

On 22nd March, 1904, plaintiff and defendants entered into an agreement whereby plaintiff agreed to purchase from defendants certain real estate at the price of $950 ($100 in cash and the balance on or before 1st July, 1904). The deposit was paid to defendants' agent in Vancouver. On 5th April, 1904, a deed of the property from defendants to plaintiff was executed in Toronto, where the defendants' head office was, and was forwarded to the Vancouver agent to hand over to plaintiff when he paid the balance of the purchase money. Plaintiff did not pay the balance on 1st July, and on 18th July defendants notified him that they treated the

Digitized by Google

sale of the property as cancelled, and that they had re-sold the property.

Harold Robertson, for plaintiff.

A. E. McPhillips, K.C., for defendants.

HUNTER, C.J.—I think this action must be dismissed. The agreement is of a very ordinary kind, and the facts are not in dispute. It is dated 22nd March, 1904, and calls for payment of $100 down, and the balance, $850, on 1st July, 1904.

On 1st July, 1904, the $850 was not paid, and defendants, by their agent, Mr. Smellie, under the power of rescission reserved in the agreement, chose to cancel it on 18th July.

There is no question but that time was of the essence of the agreement. There is an express stipulation to that effect, which reads as follows:—

"The above stipulations as to title, time, and payment, are hereby made the essence of this contract, and if any such stipulations are not observed by me or my representatives at the time specified, the corporation may treat the contract as cancelled, and all payments forfeited, and may re-sell the property without notice to me, or my representatives, in such manner and for such price as they may see fit, and I agree not to demand the production for inspection, or otherwise, of any further proof of title, nor of any deeds, papers, or documents in relation to the property other than those in the corporation's possession."

It is argued by counsel for plaintiff that the effect of the clause requiring that interest shall be paid on the unpaid balance at the rate of 8 per cent., both before and after the purchase money became due, was to nullify the stipulation I have just read, but it seems to me that these two stipulations are quite consistent. In fact, they are but common stipulations, and are generally found in agreements of this kind. The time clause is a stipulation inserted for the benefit of the vendor, which he may enforce if he chooses, but, if he does not choose to enforce it, then the other clause provides that he shall get interest at the rate of 8 per cent. from 1st April, 1904, both before and after the purchase money becomes due, until the amount is paid.

The next question is as to whether the power of rescission has been exercised with reasonable promptitude, and I am under the impression that a question of this kind is to be decided having regard to the circumstances of the particular case. I apprehend that a delay in one class of case which

Digitized by Google

would be unreasonable would not be unreasonable in another class of case.

In this particular case, the vendors happen to be a corporation with their head office in Toronto, which is a week's mail from Vancouver, and in this particular case the agent in charge, although he had a power of attorney which authorized him to cancel the contract, saw fit to ask the head office for instructions, and it is not unreasonable that he should have chosen to consult the head office, even although he had the power to deal with the matter himself; in fact, I think it is quite reasonable and proper for the agent to ask the express direction of the corporation as to what should be done in a case of this kind. As it happens, the agent did not wait for the reply, but chose to exercise his own discretion in the matter, fearing that the corporation might lose the benefit of the proposed re-sale, but I do not see how that affects the matter one way or the other. The sole question, so far as concerns the plaintiff, is whether the rescission took place within a reasonable time, and it is not to be overlooked that a corporation, whose directors are distant a week's journey from the scene of the contest, cannot be expected to move as promptly in a matter of this kind as an individual on the spot.

In the case of Barkley v. Messenger, 43 L. J. Ch. 449, I find that there was a delay from the 26th August to 2nd October, and that the time for the payment in that case had been extended from a prior date until 26th August, and that on 2nd October the party in whose favour the stipulation was made notified the other party that the contract was to be considered at an end. It does not seem to have been seriously contended in that case that there was an undue delay, and that is a considerably greater lapse of time than occurred in the present case. It seems to me that in this case the contention of plaintiff virtually amounts to a complaint that he was given 18 days' grace to pay the money, and that he would have been just as swift to complain if the rescission had taken place within a day or two after the due date.

Now, with respect to the argument that the execution of the deed at the head office in April had the effect of merging the agreement for sale, and that the property vested at once in plaintiff, I think that that contention is utterly untenable.

The case of Robertson v. Security Co., [1897] 1 Q. B. 111, cited in support of that contention, was the case of an application for a policy of insurance, and the policy was executed in the ordinary course by the company. The recital was incorrect, for the policy contained a statement that the premium had been paid, while as a matter of fact it had

Digitized by Google

never been paid, but the Court held that there was nothing in the circumstances of the case to shew that the policy was executed conditionally, and that the company were bound although the premium had not been paid. In the case in question here, it appears to me that all the circumstances go to shew that the deed was executed conditionally. The very fact that the agreement for sale stipulates that the corporation shall furnish a deed to the purchaser on the payment of the purchase money on 1st July, 1904, points to the conclusion that it was the duty of the corporation to have the deed in readiness in case the money should be paid on that date. It seems to me that the drawing up and execution of that agreement at the company's head office was simply the carrying out of the stipulation entered into between the parties, and there can be no doubt that the deed was executed conditionally, and that it was not to be delivered until the balance was paid.

There is no doubt that the case is one of hardship, as from the evidence a sum of $100 has been forfeited, and plaintiff has lost the advantage of the expenditure of a considerable sum of money on the property. As to the latter, however, it seems that the corporation were in ignorance, and the fact that plaintiff had entered into possession was, according to the evidence, also unknown to the corporation. If the corporation had known that plaintiff had entered into possession, and expended all these moneys on the property, then it would have been the duty of the Court to rigorously scrutinize the circumstances surrounding the forfeiture of the property in the hope of finding some ground of relief, but in this case it is not shewn that these facts were known to the corporation, and I therefore cannot grant any relief to plaintiff. He has entered into an agreement which called for payment of the balance of the purchase money on a day certain, and the agreement having made time of the essence, allowed the corporation to rescind it if payment was not made as stipulated. That right of rescission has been exercised, in my opinion, without any undue delay, and I see no reason why the corporation should not be allowed to retain the money in pursuance of the right which the agreement has given it.

Robertson asked that the costs in the case up to the hearing should not be given against plaintiff.

HUNTER, C.J.—Even if I had the power to refuse costs, I can see no reason why I should not give costs, as the corporation have done nothing to mislead plaintiff, but I really think the corporation should consider the question as to

Digitized by Google

whether the entire sum of $100 should be forfeited. If the pound of flesh is exacted in cases of this sort, it may provoke remedial legislation.

---

## BRITISH COLUMBIA.

### (VICTORIA.)

MARTIN, J. FEBRUARY 13TH, 1905.

CHAMBERS.

### ALASKA PACKERS' ASSOCIATION v. SPENCER.

*Trial—Special Jury—New Trial.*

Summons by defendant for trial with a special jury.

An order for trial with a special jury was made on 31st October, 1902, and the trial took place and a verdict was given in favour of defendant. On appeal the verdict was set aside and a new trial ordered by the full Court (see 10 B. C. R. 473), and affirmed by Supreme Court of Canada, 21st November, 1904.

Peters, K.C., for defendant.

J. H. Lawson jun., for plaintiffs.

MARTIN, J.—The first order for trial with a special jury is not exhausted, and this application is therefore unnecessary. The summons is discharged with costs to plaintiffs in any event.

---

## BRITISH COLUMBIA.

### (VICTORIA.)

HUNTER, C.J. FEBRUARY 15TH, 1905.

TRIAL.

### CARTWRIGHT v. THE KING.

*Crown Lands—Pre-emption—Laches—Abandonment—Petition of Right—Contract of Crown with Pre-emptor.*

Petition of right against the Crown to recover the value of a parcel of land pre-empted by one Kindred and one Hicks, for which they obtained a certificate of improvements under the Land Ordinance, 1870, and to which plaintiff became entitled by assignment.

Digitized by Google

A. C. Brydone-Jack and G. E. McCrossan, for suppliant.

D. M. Eberts, K.C., for defendant.

HUNTER, C.J. — Plaintiff entered into possession in December, 1877, and, after occupying the land for about 21 months, departed for the United States, and did not return until 1889, when he found that the parcel had been Crown-granted to one Curran. According to him, previous to his departure he was informed by Mr. Core, the present deputy commissioner of land and works, that there was no necessity for him to continue in occupation, which seems to be in accord with the provisions of sec. 6 of the amending Act of 1873, and, while Mr. Core had no recollection of this conversation, he would not state that it did not take place.

Curran applied for and purchased the land in question, together with some adjoining land, under the provisions relating to unsurveyed lands, and apparently followed the prescribed course of procedure to obtain his grant. The land office officials considered that it was open to them to grant his application, being under the impression that plaintiff's right had ceased by reason of the provisions of sec. 76 of the Act of 1884. In this, however, I think they were mistaken, as, under sec. 26 of the Act of 1870, plaintiff had a right to wait until the government surveyed the pre-emption and fixed the price which he was to pay, before he could be pronounced in default; but, in the view that I take, it is unnecessary to definitely decide this point.

Mr. Eberts, for the Crown, took the objection in limine that the petition did not lie, contending that it was in reality brought for a tort. I am unable to accede to this objection, for it seems to me that when a valid pre-emption had been defeated by a grant to another, issued by mistake, and not by reason of any fraud on the part of the grantee, the proceeding by petition of right is pre-eminently the appropriate one, if not the only one open to the party aggrieved. The Crown, by its assent to the pre-emption laws, has consented to grant the lands to those who fulfil the conditions, so that there is much the same vinculum juris set up between the Crown and the law-fulfilling pre-emptor as between an advertiser and him who performs the conditions of the advertisement. I must, therefore, overrule the preliminary objection.

On the facts, however, I am of the opinion that plaintiff fails. I think that there was an abandonment of the pre-emption. Plaintiff was absent from the Province for 10 years, moving about in various States of the Union during that time, nor did he leave any address at any time during this period with the land office, so that he could be notified

Digitized by Google

of any survey by the government or of any demand for the moneys due in the event of survey. But, even if this is not sufficient evidence of abandonment, the claim, in my opinion, is barred by laches. Plaintiff must be deemed to have known of the action of the Crown on the registration of Curran's grant in the land registry office, but, assuming that there is any doubt as to this proposition, he admits that he became aware of it about 1891, and the fiat was not asked for until 1903.

There has thus been a delay of over ten years in filing the petition, and the excuses given, viz., poverty, failure of a solicitor to proceed, application for relief to the legislature, etc., are obviously insufficient to annul the right of the Crown to rely on this defence. That laches may be a bar to relief is a firmly settled doctrine in all systems of jurisprudence, and is specially so in proceedings for specific performance or analogous thereto, as are the present proceedings. Lord Cranworth says in Eads v. Williams, 4 De G. M. & G. at p. 691: "Specific performance is relief which this Court will not give, unless in cases where the parties seeking it come promptly, and as soon as the nature of the case will permit. There is no use in going into the authorities in detail. In Watson v. Reid, 1 Russ. & M. 236, Sir John Leach refused to make a decree after the party had been waiting for twelve months, and no sufficient reason was assigned for the delay; and in Southcomb v. Bishop of Exeter, 6 Hare 213, a delay had occurred much less than the delay (3½ years) in this case." This statement of the Lord Chancellor was accepted as authoritative, and the doctrine enforced by Stirling, J., in Levy v. Stogden, [1898] 1 Ch. 484, affirmed [1899] 1 Ch. 5, and the latest deliverance on the subject generally is to be found in Patterson v. Hewitt, 25 Sup. Ct. Reporter 35.

The petition must be dismissed with costs.

---

## NORTH-WEST TERRITORIES.

### (NORTHERN ALBERTA.)

SCOTT, J. JANUARY 5TH, 1905.

TRIAL.

### WATTS v. HEHSDOERFER (No. 1).

*Sale of Goods—Contract—Payment—Security—Lien—Oral Contract—Novation—Consideration—Property Passing.*

Plaintiffs alleged that on 30th October, 1903, they sold defendant 50 head of cattle for $1,825, which defendant



Digitized by Google

agreed to pay for, as follows:—$225 on delivery, $800 on 10th November, 1903, and $800 on 10th December, 1903; that by the terms of the contract defendant agreed to give security on the cattle and upon his shop in Edmonton, for the payment of the $1,600; that plaintiffs thereupon upon that date delivered the cattle to defendant, who paid them $225 on account, but after the delivery he refused and still refused to give the security agreed upon; that he purchased the cattle for the purpose of killing them, and had already killed some of them in the ordinary course of his business as a butcher, and that the remainder would shortly be killed; and that before the delivery of the cattle defendant had mortgaged his butcher shop, but plaintiffs were not informed of the fact until after such delivery. They claimed payment of $1,600; a declaration that they were entitled to a lien upon the cattle; an injunction restraining defendant from selling or otherwise dealing with them, or from selling, mortgaging, or otherwise disposing of the butcher shop; and the appointment of a receiver to receive the rents and profits of the butcher shop and the cattle.

O. M. Biggar, Edmonton, for plaintiffs.

N. D. Beck, K.C., and C. de W. MacDonald, Edmonton, for defendant.

SCOTT, J.—On 9th October, 1903, defendant agreed to purchase 100 head of cattle from plaintiffs, and paid $50 on account of the purchase money. The following memorandum of agreement was then drawn up by the plaintiff Watts and signed by defendant, namely:—

"Edmonton, Alta., Oct. 9th, 1903.

"Bill of sale.

"Bought of I. H. Watts stock described below to be delivered free from all incumbrances and in proper shape at Edmonton or (sic) before October 31, 1903, steers weighing 1600 lbs. and over 3c. lb., steers from 1000 to 1600 lbs. 3c. lb. description of brand M7.

"One hundred good butcher's beef steers, agreed that there may be in each 50 head, one stag, and if cows are real good, not objected to, same to be weighed by 8 o'clock, morning day after arrival and settled at straight weight. 50 head of same to be delivered on or before Oct. 31, and 50 head to be delivered in Decr. 1903 on or before 20th, 1903.

"Received on purchase price $50."

In pursuance of this agreement plaintiffs brought in 50 head of cattle on the evening of 29th October, 1903, and

Digitized by Google

placed them in defendant's corral at his slaughter house, and it was then arranged that plaintiffs should return at nine o'clock on the following morning for the purpose of weighing them. When they returned the next morning it was agreed between them and defendant that instead of the price of the cattle being ascertained by their weight, defendant should pay $36.50 per head for them; defendant then offered his cheque for $200, stating that it was all the money he had in the bank. Plaintiffs objected to the amount of the cash payment, but finally agreed to accept it, and then requested security for the balance. After some discussion between them as to the nature of the security defendant agreed to give the security upon the cattle and his butcher shop, and it was then arranged that plaintiffs should return in the afternoon to receive the security. At plaintiffs' suggestion defendant raised the cash payment to $225 in order that the balance should be even money.

Plaintiff Watts returned the next afternoon to receive the security, but defendant then refused to give any security, stating that he had consulted his solicitor in the meantime, and had been advised by him that he was not obliged to give security. Defendant also stated on that occasion, or to plaintiff Hurlburt next morning, that he could not give security on the shop because it was already mortgaged by him.

Defendant alleges that on 9th October, when the written memorandum was drawn up, it was orally agreed between him and plaintiffs, that, on the delivery of the first 50 head under the contract, he was to pay one-fourth of the price, and the remainder in three equal instalments, payable respectively on 10th November and 1st and 10th December following, and he denies that, by the contract of sale or at all, he agreed to give any security for the payment of such balance.

I find upon the evidence that at the interview between plaintiff Watts and defendant on 9th October, when the original agreement was entered into, it was understood and agreed between them that if the latter could not pay the whole purchase money when the cattle were delivered he was to have time for the payment of a portion of it, upon giving security for its payment, but there was no agreement at that time as to the amount for which time was to be given, or as to what time should be given, or as to the nature of the security defendant was to give; that it was not until 30th October, when the agreement was made for the sale and purchase at $36.50 per head, that the nature of security and the time

Digitized by Google

of payment were agreed upon. The evidence is conflicting as to the terms of payment then agreed upon, but, as time was to be given only upon condition that defendant was to furnish security, and as he refused to furnish any, it is unnecessary for me to decide what these terms were.

Defendant's counsel contended that plaintiffs must fail, as the contract set up was an oral one alleged to have been entered into on 30th October, whereas the contract proved was the written one of 9th October; that the legal effect of the latter was a sale for cash, and plaintiff Watts had sworn that it was a sale for cash; that the contract for security was so vague and indefinite as not to be binding; and that, as it was not made until after the delivery of the cattle, there was no consideration for it.

The contract set up is one for the sale of certain cattle at a certain price per head, and for the giving by defendant of security upon certain property for the unpaid balance of the price. That contract was entered into on 30th October. It may be true that it was founded on the contract of 9th October, but, in my view, it is a new contract with respect to only a portion of the cattle included in the latter.

In my opinion, the agreement of 30th October, as to security, is neither vague nor indefinite as to the property to be given as security. I do not think that defendant's counsel intended to contend that it is indefinite because the nature of the security (whether by mortgage or otherwise) was not agreed upon. In case the parties could not agree as to its nature, the Court might be called upon to decide what would be a proper security.

The agreement of 9th October was for a sale for cash on delivery or for part cash with security for balance on delivery, that is, a contemporaneous exchange of goods for money or security therefor. Such being the case, it must have been the intention of the parties that the property should not pass until the price was paid or secured. There is nothing to indicate an intention on the part of plaintiffs at any time to waive their right to receive the price or security on delivery. The leaving of the cattle with defendant on the morning of 29th October, affords no such indication. They were left there for the purpose of being weighed next morning, in order that the price might be ascertained. I therefore hold that the property in them had not passed to defendant at the time the agreement of 30th October, as to the price, the terms of payment, and the security to be given, was entered into, and that there was a good consideration for the agreement as to security.

Digitized by Google

Defendant's counsel also contended that plaintiffs had parted with the possession of the cattle, and that, as their right of lien is dependent upon actual possession, their lien was gone.

It may be open to question whether, in the circumstances of this case, plaintiffs are entitled to a lien upon the cattle in the ordinary acceptation of that term, but I do not understand that they are claiming such a lien. What I understand by their claim is that under defendant's agreement to give security upon the cattle they are entitled to a lien upon them for the purpose of that security. That security would in itself constitute a lien, and I hold that under the agreement of 30th October they became entitled to it, as well as to security upon defendant's shop. The evidence shews that defendant's shop had not been mortgaged by him, as is alleged in the statement of claim, but it also appears that after the agreement of 30th October was entered into defendant represented to plaintiffs that it had been mortgaged by him. I hold that the $50 paid by defendant on 9th October, on account of purchase price, was so paid on account of the price of the 100 head as a deposit to secure the performance by him of his contract, and that he is not entitled to have it applied on account of the cattle delivered on 30th October.

Soon after the commencement of this action, upon the application of plaintiffs, I granted an injunction restraining defendant until further order from dealing with the cattle in question or his shop. In order to obtain the withdrawal of that injunction defendant paid into Court $1,600 to be apportioned as follows: 231.25 as a payment into Court under paragraph 7 of his defence, and the remainder as a special deposit by way of security for the payment of such further amount as plaintiffs might recover, subject in all respects to my order regarding same after trial and final judgment herein.

In view of this payment into Court, it is unnecessary for me to direct that defendant shall execute a proper security upon the cattle and shop for the payment of the balance of the purchase money. I give judgment for the plaintiffs for $600, with costs of suit, and I direct that the moneys paid into Court by defendant shall, on entry of judgment, be paid out to plaintiffs on account thereof. I hold that plaintiffs are entitled to the costs of and incidental to the injunction obtained by them.

Taylor v. Eckersley, 2 Ch. D. 302, shews that the injunction was properly granted.

Digitized by Google

## NORTH-WEST TERRITORIES.

### (NORTHERN ALBERTA.)

SCOTT, J. JANUARY 5TH, 1905.

TRIAL.

### WATTS v. HEHSDOERFER (No. 2).

*Sale of Goods — Contract — Breach — Refusal to Accept — Damages—Costs.*

Action for damages sustained by plaintiffs by reason of defendant's refusal to accept 50 head of cattle sold by plaintiffs to him, which were to be delivered on 20th September, 1903.

O. M. Biggar, Edmonton, for plaintiffs.

N. D. Beck, K.C., and C. de W. MacDonald, Edmonton, for defendant.

SCOTT, J.—The terms of the contract between the parties respecting the cattle are set out and discussed in my judgment in the preceding case.

On 13th November, 1903, plaintiffs' advocates wrote defendant asking him whether he desired to take the remaining cattle under the contract, and stating that the expense of bringing in the cattle would be very great, and that plaintiffs were willing to cancel the contract as to them, if satisfactory to defendant. On 17th November defendant's advocates wrote plaintiffs' advocates stating that defendant would take the cattle at the date fixed by the agreement. On 20th November plaintiffs' advocates wrote defendant's advocates stating that the cattle must be paid for in cash on delivery, and that if defendant did not intend to pay cash they should be advised in order that they might instruct plaintiffs not to bring the cattle in. On 21st November defendant's advocates wrote plaintiffs' advocates stating that they were not instructed by defendant whether he intended to pay cash or not, but that he demanded delivery of the cattle under the terms of the contract; that there was a dispute between the parties as to whether the transaction was one for cash; and that plaintiffs could consult their convenience about delivery.

On 23rd November plaintiffs' advocates wrote defendant's advocates stating that plaintiff Watts had left for the ranch to bring in the cattle; that if, on their arrival, defendant de-

Digitized by Google

clined to pay cash, plaintiffs would hold him responsible for the damages incurred; that plaintiffs would insist upon the terms of the written contract; and that, if defendant had any intention of repudiating it, he would be doing so with notice of the damage likely to be sustained. On the same date plaintiffs' advocates wrote defendant a letter to the same effect.

On 3rd December defendant's advocates wrote plaintiffs' advocates in answer to their letter of 23rd November, stating that defendant instructed them to state that he would not pay cash for the cattle, and that, if plaintiffs would not deliver on any other condition, they had better not bring them in. On 4th December plaintiffs' advocates wrote defendant's advocates in answer to their letter of 3rd December, stating that their intimation came too late, as plaintiff Watts had left some days before to bring in the cattle. Mr. MacDonald, one of defendant's advocates, in his evidence at the trial states that shortly after writing the firm's letter of 3rd December he received a telephone message from Mr. Short, one of plaintiffs' advocates, acknowledging receipt of his letter, and stating that it was too late, as plaintiff Watts was already on his way to the ranch, and was likely to be starting from there in two or three days, to which he, MacDonald, replied that it was not too late and that he was then notifying Mr. Short in order that he might stop plaintiff Watts, and that defendant would contest any claim for damages, as there was ample time to stop him.

The effect of the written memorandum of 9th October is that plaintiffs were entitled to payment of the price on the delivery of the cattle, and I hold that as to the last 50 head to be delivered under the contract there was no variation of the terms of the memorandum in that respect, and that, as plaintiffs were entitled to receive the price on delivery, defendant was not justified in refusing acceptance on those terms.

There remains the question of the amount of damages plaintiffs are entitled to recover. The contract price was 3 cents per pound; the average weight of the 50 head is shewn to be about 1,200 pounds each. Under ordinary circumstances the measure of damages would be the difference between the contract price and the market price at the time fixed for delivery. There is this to be said, however, that, if defendant had given reasonable notice of his refusal to accept, and plaintiffs had not gone to the expense of bringing the cattle in for delivery, the probable cost of bringing them in should be deducted from that difference. Plaintiffs should be compensated only for their actual loss, and, as they were bound

Digitized by Google

under their contract to incur that expense, the saving of it should not be added to the difference but deducted from it.

In the present case the expense of bringing in for delivery was incurred, but defendant contends that, although he at first notified plaintiffs that he would accept on the terms of the contract, he gave notice of his refusal to pay cash before it was too late to stop delivery. I think that before plaintiffs started to bring in the cattle they gave defendant every reasonable opportunity to consider his position and to decide whether he should accept or refuse delivery, or even whether he should abandon his contract. When first applied to, he gave notice within 24 hours that he would accept, but, when notified that plaintiff Watts had left for his ranch for his cattle, it took him 11 days to decide that he would not accept if he had to pay cash. When he did so decide, he asked plaintiffs' advocates to send out a special messenger to stop plaintiffs bringing in the cattle. If he had offered to send out a messenger, I think that plaintiffs should have accepted his offer and have endeavoured by that means to stop the expense. The distance was such that it would have taken two days to reach the ranch, and it is possible that the messenger might have reached there in time, but I do not think it was incumbent upon plaintiffs to proceed when at that stage. I, therefore, hold that defendant is not entitled to any deduction in respect of these expenses. The cattle are still held and owned by plaintiffs. The market price at the time fixed for delivery is shewn to have been about 2½ cents per pound. The market price at the time of the trial is shewn to be about equal to the contract price. I see no reason why the latter should not be taken into consideration in estimating the loss plaintiffs have sustained. The cattle brought in for delivery were shewn to have depreciated in weight by reason of the journey, but the evidence shews that at the time of the trial they had about recovered their former condition. Plaintiffs should be allowed the cost of maintaining and keeping the cattle from 20th December up to the trial. This I fix at $3.50 per head, making a total of $175. From this must be deducted the $50 paid on account of the price at the time that the contract was entered into. I give judgment for the plaintiffs for $125. I also direct that they shall be entitled to costs on the higher scale, as the loss they have sustained has been materially reduced since the commencement of the action.

Digitized by Google

## NORTH-WEST TERRITORIES.

### (NORTHERN ALBERTA.)

HARVEY, J. FEBRUARY 13TH, 1905.

CHAMBERS.

## REX v. HOSTYN.

*Liquor License Ordinance—Conviction for Illegal Sale of Liquor—Motion to Quash—Penalty Less than Prescribed by Act—Invalidity of Conviction—Saving Enactment—Criminal Code, sec. 896—Application of Conditions—Appeal.*

Application by defendant, without the aid of a writ of certiorari, to quash a conviction made by D. E. Strickland, justice of the peace, and returned to the deputy clerk at Edmonton, whereby defendant was found guilty of a breach of sec. 77 of the Liquor License Ordinance, and fined $5 and costs, and in default of payment ordered to be imprisoned for 20 days.

The section provides as follows: "Any licensee who allows to be supplied in his licensed premises, by purchase or otherwise, any description whatever of liquor to any person under the age of 18 years, of either sex, shall, as well as the person who actually gives or supplies the liquor, be guilty of an offence, and on summary conviction thereof be liable to pay a penalty of $25 for a first offence, and, in default of payment forthwith after conviction, to one month's imprisonment"

J. D. Hyndman, Edmonton, for the defendant, contended that the only penalty which the magistrate could impose for the offence was a fine of $25, and in default imprisonment for one month, and that, the proper penalty not having been imposed, the conviction was bad.

N. D. Beck, K.C., for the magistrate and informant.

HARVEY, J.—While I am not by any means free from doubt as to whether the wording of the section makes the fine and term of imprisonment specified a definite penalty for all cases, or merely a maximum penalty, yet, as the proposition was not disputed by the counsel for the magistrate and the informant, I will, for the purpose of this case, assume that

Digitized by Google

it is correct. Such being the case then, unless the conviction is saved by some provision of law, it is bad and must be quashed. Counsel for the informant urged that, although in Rex v. Plante (not yet reported) it was held by Scott, J., that secs. 889 and 890 of the Criminal Code, which relate to proceedings by way of certiorari, are not available in proceedings to quash a conviction for breach of an Ordinance, in view of the limitation of the Magistrates' Ordinance and amendments to those provisions of part 58 of the Criminal Code relating to proceedings before justices of the peace and to appeals from convictions, yet that sec. 896 does apply, since by its terms it is made applicable to all convictions which are proceedings before justices of the peace. I admit that I am very much impressed with this contention, and with the view that the meaning of the section is that every conviction where the conditions expressed in that section exist, shall be good and valid notwithstanding that it may be defective in form, and that, as appears by sec. 890, the imposition of a penalty less than that prescribed is a mere irregularity or informality. It is, however, unnecessary to decide this point, because there is no evidence before me that defendant has not appealed against the conviction, or that, if he has appealed, the conviction has been affirmed, which are the conditions of the section. This being the case, the section can have no application here, and the conviction must be quashed. There will be the usual order for the protection of the magistrate.

---

## NORTH-WEST TERRITORIES

### (SASKATCHEWAN.)

PRENDERGAST, J. FEBRUARY 13TH, 1905.

CHAMBERS.

### GOUGEON v. THOMPKINS.

*Practice — Affidavit Sworn before Solicitor for Affiant — Necessity for Independent Commissioner—Determination of Question whether Commissioner Acting as Solicitor for Affiant—Authority of Commissioner.*

A Chambers summons was issued by Herbert Acheson, who claimed to be the assignee of money due by the garnishee to defendant, to set aside a garnishee summons, on the

Digitized by Google

grounds: 1, that the affidavit on which the garnishet summons issued was sworn to before the issue of the original summons; 2, because the affidavit was sworn to before the advocate acting for the party on whose behalf the garnishee summons was issued.

After hearing counsel on the return of the summons, PRENDERGAST, J., dismissed it, dealing, however, only with the first ground, as he was under the impression that the second objection was not urged, in fact was abandoned.

An application was then made to vary the first order and make the summons absolute on the strength of the second ground.

J. McKay, K.C., and D. W. Adam, Prince Albert, for Acheson.

J. H. Lamont, Prince Albert, and A. Turgeon, Prince Albert, for plaintiff.

PRENDERGAST, J.—Rule 308 of the Judicature Ordinance, which, in so far as it can affect this issue, is identical with the English Rule 536, is peremptory. In Re Hogan, 3 Atk. 813, the Lord Chancellor said, with respect to reading affidavits taken before a person who was a solicitor in the cause: "At common law it is always objected to and discountenanced, and so in equity." In Hopkin v. Hopkin, 22 L. J. Ch. 728, Wood, V.-C., pronounced the irregularity one "of substance and not merely of form," and in Bourke v. Davis, 44 Ch. D. at p. 126, the latest case I have found on the matter, Kay, J., said: "It has been the rule since the time of Lord Hardwicke that the Court does not accept an affidavit sworn before the solicitor in the cause. . . . The Court requires the security of an independent commissioner." Foster v. Harvey, 4 De G. J. & S. 59, cited by Mr. Turgeon, is a case where a party in a cause who happened to be a solicitor swore to an affidavit before a clerk in his own office, which is altogether a different state of facts from that in the present case.

There is also a decision from one of the Courts of the State of New York, cited in 2 Cyc. of Law and Prac., p. 13, note 57, where, on an affidavit being set aside on the aforesaid ground, leave was given to file a new one nunc pro tunc; but, while such leave might probably be granted here in cases of affidavits in support of ordinary applications, I do not think our Rule would allow of its being extended to affidavits in support of process actually issued.

But, however clear the Rule, the question here is whether Mr. Smith, who is an advocate, and before whom the affidavit was sworn, was "an advocate acting for the party on whose behalf the affidavit was to be used." Of course the words "an

Digitized by Google

advocate acting for the party," etc., necessarily mean "an advocate acting as such for the party," etc. As stated in Bourke v. Davis, above cited, the reason of the rule is that "the Court requires the security of an independent commissioner." I take it that what would cause an advocate, in the circumstances mentioned, to be considered not "an independent commissioner," would be a dutiful sense of his undertaking to have justice done to his client, and also a twofold personal interest, monetary on the one hand, and on the other resulting from the credit and satisfaction which follow the successful termination of a legal issue. I have read for the plaintiffs the affidavits of themselves, of Mr. Smith, and of Mr. Cairns, the garnishee. They are to the effect that, without having seen Mr. Smith in the matter, the plaintiffs went and asked money from Cairns; that Cairns advised them to sue the defendant, and garnish him (Cairns) that they then, all three, went to Mr. Smith, who at once told them that he could not act for them or advise them, but nevertheless assisted them at their request by having the statement of claim and affidavit in question prepared by a clerk in his office, and causing the same to be sent to the clerk of the Court, together with the disbursements which they (the plaintiffs) then put in his hands. The affidavit of Merseman (the clerk who drew the statement of claim and affidavit) does not materially differ from the above, except that he states that Mr. Smith was already retained by and acting for the defendant, which is rather against the assignee's contention, unless we are to assume that an advocate of good standing was deliberately acting at the same time for both parties in the cause.

Of course, this being a small debt action, it was not necessary that the name of the advocate should be indorsed on the writ; but the garnishee summons, and the original summons, issued at the same time, have the indorsements, in one case, "this writ was issued by Louis Gougeon," etc., and in the other, "this writ was issued by the plaintiff in person. . . ." In both cases the garnishee summons was served on Cairns by the plaintiffs themselves. It is also to be noted that small debt proceedings are the least technical possible.

To sum up, I find that Mr. Smith declared from the start to plaintiffs that he could not and would not act for them as their advocate; that the assistance he gave them was in matters so simple as to fall easily within the class of clerical work; that he was to receive and in fact received no fees for his services; that he was, in short, an independent commissioner, having no interest in the event of the cause, either from a monetary point of view, from a feeling of duty to

Digitized by Google

plaintiffs, or from considerations of self satisfaction or personal credit. On these grounds Mr. Smith was not, in my opinion, an advocate within the meaning of Rule 308.

The objection was also taken that it does not appear on the affidavit in the Gougeon case, in what capacity Mr. Smith administered the oath—it not being urged that Mr. Smith had not such authority. It is sufficient I think that there should be amongst the papers in the cause other affidavits purporting to have been sworn before Mr. Smith as a commissioner.

There is the further ground, not relied upon in the summons, that the affidavit in the Gougeon case does not comply with Rule 305. This, contrary to the provision of Rule 308, is a matter of discretion with the Court; and I am satisfied with the further material before me (the very assignment relied upon by the assignee is particularly enlightening), that this unlettered Gougeon nevertheless knew very well what he was swearing to in the affidavit. I do not see why, then, on the second ground, any more than on the first ground urged therein, the summons should be made absolute. But no costs will be allowed on the present application, inasmuch as the letters and papers put on record by and on behalf of the plaintiffs are surely apt to convey a mistaken impression on the point here immediately at issue, although such, of course, was never intended. The summons to set aside the garnishee proceedings herein is dismissed, with costs to the plaintiff on the first return thereof.

---

## NORTH-WEST TERRITORIES.

### (EASTERN ASSINIBOIA.)

WETMORE, J. FEBRUARY 25TH, 1905.

CHAMBERS.

### RE LILLY.

*Executor—Accounts — Assets — Sale of Property — Disbursements—Auctioneer's Fees—Vouchers—Declarations of Indebtedness—Security—Advertisement for Creditors.*

Application by the executor of the will of Humphrey C. Lilly, deceased, to pass his accounts as executor.

E. A. C. McLorg, Moosomin, for the executor.

J. T. Brown, Moosomin, for Charles Wood, one of the legatees.

Digitized by Google

WETMORE, J.—I will first deal with the assets. I am of opinion that the sale by the auctioneer was properly held. It is true that there is no evidence establishing the length of time of the advertisement for the sale or the nature of the advertisement. But McEwen in his affidavit states that it was well advertised, and a copy of the poster is produced, and it appears that the sale took place on the date mentioned in the poster. I think it would be better in these cases to state that the sale was fair, and also to shew the nature of the advertisement used; but, in the absence of evidence to the contrary, I must hold that the sale was properly conducted, and that the articles were sold to the highest bidder. I may add that, judging from the auctioneer's sale book, I have come to the conclusion that the sale was well attended.

I find, however, a slight difference of $2.10 between what the executor's accounts shew and what was actually realized from the sale. The true gross amount realized from the sale

| | |
|---|---|
| was ..... | $2,449 60 |
| and that, with the proceeds of the testator's share of wheat on the farm ..... | 498 55 |
| the proceeds of his share of the oats on the farm.. | 132 25 |
| what was received from the sale of a colt ..... | 51 00 |
| and accounts collected ..... | 441 10 |
| makes a total of ..... | $3,572 50 |

with which the executor is chargeable.

According to the executor's affidavit, the only property remaining undisposed of is a brass watch and some personal trinkets, photographs, and small minor personal belongings, all of a nominal value of, say, $10. But in the first schedule to the executor's affidavit there appears to be a number of claims, presumably for stud fees, the amount of which is not mentioned. There is nothing to shew what has become of these, whether they were good, bad, or indifferent, or whether any effort has been made to collect them. Then there is some personal clothing belonging to the testator; there is nothing to shew what has become of that, and this is made more pertinent because attached to the auctioneer's, McEwen's, affidavit is a charge of $7 for washing, ironing, and packing these very clothes, in view of the proposed sale. I assume that the tin safe mentioned in paragraph 5 of the first schedule is the money-box sold at auction.

Digitized by Google

The executor is entitled to be credited with the following expenditures on account of the administration of the estate: Paid auctioneer's fees and commission as follows:

| | |
|---|---|
| D. McEwen, commission | $122 35 |
| D. McEwen, paid for printing and advertising | 13 75 |
| D. McEwen, paid for use of rink for the purpose of the auction sale | 6 00 |
| D. McEwen, taking inventory | 5 00 |
| James Veronelly, freighting the property and fetching cattle to Grenfell for the purpose of the sale | 53 00 |

I will not allow the $7 for washing and ironing and packing the clothes, because, so far as the evidence at present shews, this work served no purpose. Nor will I allow the auctioneer $10 for sale clerk. I think $122.35 commission is exorbitant, and I think an executor or administrator ought to endeavour before he engages an auctioneer to make a special bargain by which such an exorbitant charge could not be exacted. In the absence, however, of any such special bargain, 5 per cent. seems to be the usual fee, and I cannot see my way clear to refuse allowing it. But I will not allow the auctioneer to charge such a fee as that and allow him the fees of the clerk in addition; with such a fee he must pay the clerk out of it.

There is also a charge in 'Account A. Receipts," of $45.75 for labour in connection with the testator's half share of the crop on the farm at Kilfane; I cannot allow that, as there is no voucher for it.

Mr. Walter's charge for funeral expenses of $85, in the absence of any explanatory circumstances, appears to be exorbitant, and I cannot allow it until it is further explained. All the other payments credited appear to be for debts due by the testator in his lifetime.

I held in Re Estate of Sapwell, F. 219, that, if objected to, the declarations of indebtedness must comply with Rule 596 of the Judicature Ordinance. None of the declarations filed comply with that Rule, inasmuch as they do not state whether or not the claimants hold security for their claims. Nearly all of these declarations are also defective in another respect, because they refer to accounts or statements alleged to be annexed, and which really contain the particulars of the indebtedness, and these annexed bills are not marked by the officer taking the declarations as being the bills referred to therein. The only declaration that approaches being correct is that of Tryon. He does state that he holds security for a

Digitized by Google

part of his claim, and states the nature of it; but there is a claim outside of the part so secured, and he does not state whether he holds security in respect to that or not, but I am inclined to think that he having stated that he held security as to part of the claim, it would properly be inferred that he held no security as to the other. But this declaration refers to an annexed statement, and that statement is not marked by the officer.

In many cases the particulars are very meagre. There are no declarations with respect to the claims of W. Peel, R. Sutherland, A. M. Bush, M. Temple, and H. Cole. I do not understand the account of P. Leach for grave-digging.

I also draw attention to the affidavit of Charles Wood filed, in which he states that a steer, calf, and pig were delivered to the Veronellys, which are not accounted for; and also that there was a quantity of hay belonging to the estate which is not accounted for. I think the executor must answer that affidavit. Then, Wood's affidavit throws very great doubts on the account of Veronelly, which the executor seems to have paid.

I further draw attention to the fact that no order was obtained from a Judge to advertise for creditors. I do not say that it is absolutely necessary to obtain such an order in view of the passing of accounts, but I will not make an order for the distribution of the surplus so as to relieve the executor in the absence of such order.

Digitized by Google

THE

# Western Law Reporter

VOL. I. TORONTO, MARCH 15, 1905. No. 4.

## MANITOBA.

RICHARDS, J. FEBRUARY 27TH, 1905.

CHAMBERS.

### REX v. OSBERG.

*Criminal Law — Keeping Bawdy House — Conviction—Evidence—Place of Resort for Prostitutes — Criminal Code, sec. 195.*

Application for a writ of habeas corpus on behalf of a woman, convicted by the police magistrate for the city of Winnipeg of keeping a bawdy house, and committed to gaol for default in payment of the fine imposed on such conviction.

R. A. Bonnar, for the prisoner.

G. Patterson, for the Crown.

RICHARDS, J.—The woman lived in a house by herself, and had been (and still was reputed to be) a prostitute, and her house was reputed to be a house of prostitution.

The evidence shewed that on the day in question it was visited by another woman, known to be a prostitute, and that on a previous date another woman, who had formerly been one, had visited it.

It is not shewn that men went there with them, or (except as hereinafter mentioned) were in the house during these visits.

One witness testified generally that he had seen women go there, but did not (so far as the reported evidence, by which I must be guided, goes) state their numbers or the number of their visits, or what character the women bore. His



Digitized by Google

testimony may have referred only to the visits above particularly specified.

There was evidence that men frequently resorted to the house during the night, and that many of them drove to it in cabs. The place was undoubtedly a source of great annoyance to reputable people living in the same street.

A detective visited the house on the day on which the offence is charged to have been committed. He was delayed at the door. The lights were turned out before he was admitted. He found in the house a young man as well as the prostitute, who, on that occasion, was visiting there. Apparently both were fully clothed, and the detective saw no evidence of acts of prostitution.

It was held by Killam, C.J., in Rex v. Young, 14 Man. L. R. 58, that a woman, living by herself in a house, cannot be convicted of keeping a bawdy house therein, unless other women than herself resort to it for the purpose of acts of prostitution.

It was also held in Singleton v. Ellison, [1895] 1 Q. B. 607, that a woman, living alone and receiving men in her house and committing fornication and indecent acts with them, is not thereby guilty of keeping a bawdy house.

It is established by a number of decisions and authorities that a house, to be a bawdy house, must be resorted to in common, for the purposes of prostitution, by other women than its keeper, when that keeper is a woman.

Such a condition is not established by the evidence in this case. There is only definite evidence of two women visiting the house in several weeks, each going once only. No evidence is given as to the purpose of their visits. That purpose cannot be inferred merely from their bad reputations, if unsupported by evidence of some acts of unchastity by them on the premises.

Even if the legal definition of a bawdy house included the case of a woman living by herself and receiving men for the purpose of acts of prostitution with herself alone, which it apparently does not, yet, in order to support a conviction, more would have to be shewn than the woman's bad reputation and the mere fact that men resorted to the house.

Actual proof would have to be given of some act or acts of prostitution, though definite proof of one might be sufficient: Regina v. St. Clair, 3 Can. Crim. Cas. 557.

It was suggested that in deciding the case of Rex v. Young (supra) the learned Chief Justice overlooked the defi-

Digitized by Google

nition of a common bawdy house given in sec. 195 of the Criminal Code, which it was argued, is wide enough to include a place kept by one woman alone for her own prostitution only.

I have looked at the notes taken by the learned Judge on the argument of that case, and find that sec. 195 was noted by him, as being relied on to support the conviction. That fact, combined with his well known thoroughness in thinking over every possible point in a case, satisfies me that he considered the definition in sec. 195, but did not think that it changed the previously established definition.

It may be pointed out here that, in that case, there was definite evidence of one act of prostitution on the premises by the woman charged, who was the keeper of the house. So that, if the definition in sec. 195 had seemed to the learned Judge to be applicable, there would have been evidence on which to uphold the conviction, and he would have upheld it beyond doubt.

The definition in sec. 195 is identical with that given in Stephen's Digest of Criminal Law, art. 201. That was cited on the argument in Singleton v. Ellison (supra), but apparently held not to affect the decision.

Reading sec. 195 of the Code with the cases cited in the learned author's notes to art. 201 in Stephen, and with Rex v. Young and Singleton v. Ellison, I am of opinion that I must construe that section as intended merely to define the nature of the premises within which a bawdy house may be kept, and not as stating what acts constitute such keeping. Apparently it merely enacted in statutory form what had already been decided to be the law as to the nature of the premises.

Taking the above view, I am obliged to hold that the woman was illegally convicted.

A number of other points were argued which need not now be dealt with.

Counsel for the Crown, in order to save time, consented that the case should be dealt with as if on the return to a writ of habeas corpus. I therefore order that the accused be discharged from custody. There will be no costs to either party.

Digitized by Google

## MANITOBA.

RICHARDS, J. MARCH 1ST, 1905.

TRIAL.

### BELL v. ROKEBY.

*Principal and Agent—Agent's Commission on Proposed Sale of Land—Finding Purchaser—Implied Acceptance of Offer—Correspondence—Subsequent Sale to Another—Jurisdiction—Cause of Action—Contract—Place of Performance.*

Action to recover a commission on an alleged contract of employment to find a purchaser for lot 14, D. G. S., Headingly, at a price to be approved of by defendant, plaintiff alleging that he did find and produce a purchaser able and willing to buy on terms agreed to by defendant.

T. M. Daly, K.C., for plaintiff.

T. G. Mathers and T. Hunt, for defendant.

RICHARDS, J.—. . . The facts are that, after some negotiations during which defendant became aware that plaintiff was trying to procure a purchaser for the land, in return for which he was to be paid a commission if he did procure one that the defendant would accept, and during which defendant had stated the price at which the land was held to be $15 per acre, plaintiff procured a gentleman who was willing to buy for $12 an acre, all to be paid on getting a transfer and a good title.

Plaintiff then, on 16th May, 1903, wrote to defendant as follows (omitting immaterial parts):—"I have just received a solid offer of $12 per acre for your Headingly farm, paid in cash. If accepted instruct your solicitors here to carry out the deal and instruct them to pay the 5 per cent. commission."

On 19th May, 1903, defendant replied that he could not sell for less than $15 per acre without consulting his father; that he was writing to his father about it; and, on getting his reply, would let plaintiff know if the father was disposed to accept the offer.

Prior to the procuring of his proposing purchaser, plaintiff had been informed by defendant that the land was the property of the father.

On 23rd May, 1903, defendant wrote to plaintiff as follows:—"I have heard from my father that he will accept

Digitized by Google

$12 per acre for the Headingly farm. As you know, James Scott has this farm in hand for sale, and I have written to him to take the matter up with you. Will you therefore please call on him and arrange regarding commission, as of course I can not afford to pay more than one commission. No doubt he will agree to divide with you."

The land referred to as the "Headingly farm" is lot 14, D.G.S., Headingly. Apparently the registered title to it stood in the name of defendant's father. Defendant held a power of attorney authorizing him to sell the father's lands.

Plaintiff did not go to Mr. Scott, nor did Scott go to plaintiff.

On 1st June, 1903 (and after the receipt by plaintiff of defendant's letter of 23rd May), plaintiff and his purchaser went to the office of Messrs. Howell, Mathers, & Howell, whom plaintiff believed to be defendant's solicitors. The purchaser then paid to Messrs. Howell & Co. $500 on account of the purchase, and stated his readiness to pay the balance so soon as title could be made to him. He was able to pay the balance of the purchase money at any time. Mr. Howell's firm, on the same day, by letter reported to defendant the receipt of the $500, and sent him, for execution, a transfer of the land to plaintiff's purchaser.

About 28th May, 1903, defendant received from Mr. Scott (referred to in the letter of 23rd May) a telegram to the effect that he, Mr. Scott, had sold the land for $12 an acre, cash. Defendant, on 1st June, 1903, replied by letter accepting that sale. Later on he carried it out (the purchaser not being the one procured by plaintiff) and caused a commission of 5 per cent. to be paid to Scott for procuring it. He did not notify plaintiff of Scott's offer or of his acceptance of it.

The deposit of $500 was subsequently returned to plaintiff's purchaser.

I am of opinion that defendant in their dealings was contracting on his own behalf with plaintiff, and knew that plaintiff looked to him to pay the commission, if earned.

The wording of the letter of 23rd May is not very definite as to the acceptance. But, read with that of 19th May, I think it accepted the sale that plaintiff had negotiated, and was sufficient to enable plaintiff, on producing his purchaser, as he did, to claim the commission.

The letter of 23rd May does not seem to make it a condition precedent to the acceptance of plaintiff's purchaser that plaintiff should get Scott's consent.

It seems rather to shew that defendant had doubts as to whether he might be liable to Scott if he sold through plain-

Digitized by Google

tiff, and that he would expect plaintiff's claim for commission to be reduced by any sum that he might be so liable for. There is no evidence that defendant would have incurred any liability to Scott if he sold through plaintiff. When he wrote, on 23rd May, he had not received Scott's offer, and apparently Scott had not then found a purchaser. For all that appears, defendant could have withdrawn any arrangement he may have had with Scott.

It is not necessary now to consider whether, in case the sale to plaintiff's purchaser had been carried out, it would have been incumbent on plaintiff to protect defendant against claims by Scott. Not only are no such claims shewn, but defendant, by his own actions, has made that question irrelevant.

Mr. Howell, I find, was defendant's agent, to whom plaintiff was to produce his purchaser, and plaintiff's agent to receive the deposit.

The proof of that agency I allowed to be given in evidence (though defendant's counsel objected) on affidavit made by Mr. Howell, and filed in Chambers on an application to set aside the service of the statement of claim on the defendant as having been made outside of Manitoba.

That application in Chambers was dismissed, on counsel for the plaintiff undertaking to prove, at the trial, a cause of action within Rule 201 (e) of the King's Bench Act. It seems to me that the contract sued on was shewn to be one that "ought to be performed in Manitoba," which would bring it within that sub-section.

The price of the land at $12 per acre was $8,568. The commission as understood between the parties was to be 5 per cent. of the sale price. There will be judgment for plaintiff for $428.40 with costs.

---

## MANITOBA.

RICHARDS, J. MARCH 1ST, 1905.

COUNTY COURT APPEAL.

### DREGER v. CANADIAN NORTHERN R. W. CO.

*Railway—Fences—Cattle—Railway Act, sec. 199—Construction.*

Appeal by defendants from judgment of County Court of Morris.

Digitized by Google

The question in dispute was whether defendants were liable to plaintiff for the loss of his cow. There was a defective fence, which defendants had erected, along the line between their right of way and plaintiff's land. Owing to its defects the cow got on to the right of way and was killed by one of defendants' trains.

The trial Judge held that defendants were under a duty to maintain the fence, and gave judgment in plaintiff's favour.

The defendants appealed on the ground that there was no such duty imposed on them.

T. M. Daly, K.C., for plaintiff.

D. H. Laird, for defendants.

RICHARDS, J.—Plaintiff's land was cultivated next to the right of way and settled on but not enclosed.

Section 199 of the Railway Act, 1903, says: "The company shall erect and maintain upon the railway fences . . . as follows:

"2. Such fences . . . shall be suitable and sufficient to prevent cattle . . . from getting on the railway.

"3. Whenever the railway passes through any locality in which the lands on either side of the railway are not improved or settled, and inclosed, the company shall not be required to erect and maintain such fences . . . unless the board otherwise orders or directs."

The board had not made any order or given any direction affecting the duty or absence of duty to fence, in question in this case.

The trial Judge held that sub-sec. 3 of sec. 199 means that "when the lands are not improved and not inclosed, or not settled and not inclosed, the company are not bound to fence," and that therefore to relieve the company from the duty to fence, "the land must be both not improved and not inclosed, or not fenced and not inclosed."

There is another view, that has been suggested by one of my brother Judges, that sub-sec. 3 means that the exemption from the duty exists where the land is neither (1) improved nor (2) settled and inclosed.

In other words, that the whole section means that there is a duty cast on a railway company to fence where the adjoining land is either (1) improved or (2) settled and inclosed.

Digitized by Google

That reading would be made plainer by removing the comma that follows "settled," and inserting one after "improved," and treating the present position of the comma as a mistake in punctuation. Such changes are frequently read into Acts, when required by the necessity to find a reasonable interpretation of the meaning of the enacting Legislature.

As either of the above interpretations would impose the duty of fencing in this case, I do not feel called on now to decide between them; one or the other of them must, I think, be correct.

There was a further question whether the cow was so at large as to relieve defendants under sec. 237, from liability.

I agree with the trial Judge that the animal was not "at large" within the meaning of that section.

The judgment in the County Court is affirmed and the appeal dismissed with costs.

---

## MANITOBA.

MARCH 4TH, 1905.

FULL COURT.

### MANEER v. SANFORD.

*Specific Performance—Sale by One of Three Executors without Authority—Personal Liability of Executor for Misrepresentation.*

Appeal from decision of PERDUE, J., 24 C. L. T. Occ. N. 70.

Defendant Riley was one of the executors of W. E. Sanford. On 16th April, 1903, he wrote to A. E. Smalley that the property in question in this case, being part of the estate, was for sale, and asked Smalley to let him know if he could find a purchaser, the price being fixed at $750.

On 18th April Smalley wrote him that plaintiff would give $750, cash down $250 and the balance in annual instalments of $100 each. Riley replied on 25th April, accepting plaintiff's offer and enclosing agreement for sale, which plaintiff signed and returned, with a cheque for $250.

Subsequently Riley returned the agreement and cheque to plaintiff, telling him in his letter that he could not carry

Digitized by Google

out the sale, owing to a misunderstanding between himself and one Dancy, to whom he alleged he had previously sold the property. The agreement sent plaintiff was made out in the name of the three executors. Riley stated at the trial that he had no authority from his co-executors to make the sale.

The trial Judge found that there was an agreement for sale of the lands to satisfy the Statute of Frauds if Riley had power to bind his co-executors, but, as it was shewn that he had not such power, the trial Judge found him personally liable for the misrepresentation of authority.

E. Anderson and A. B. Hudson, for plaintiffs.

J. A. M. Aikins, K.C., for defendant Riley.

H. A. Robson, for defendants the executors.

The judgment of the Court was delivered by

DUBUC, C.J.—I think the trial Judge was right in holding as he did, and his decision should be upheld.

It is contended on behalf of Riley that the agreement for sale relied on by plaintiff contained a variation of the terms agreed upon by the letters, or additions thereto. But the variation or addition of terms, if such there was, was made by Riley himself, who had the agreement for sale prepared, and the variation or addition was accepted by plaintiff when he executed the agreement and returned it to Riley with the cheque. Riley cannot be allowed to object to the validity of a contract, on account of variations of the terms, when the variations were made by himself and accepted by the other contracting party.

It is also contended that plaintiff can only recover for expenses actually incurred by him, and not for the loss of his bargain. It is true that if a vendor is unable to make good title, he is only liable to the purchaser for the expenses incurred in investigating the title and other expenses of the same nature; and not for loss of bargain, but it is different where the transaction fails through the want of authority in the agent of the vendor, or other similar cause; the purchaser in such case is entitled to recover damages for loss of his bargain as well as for his expenses in connection with the transaction: Robinson v. Harman, 1 Ex. 850; Engel v. Fitch, L. R. 4 Q. B. 659; Richardson v. Williamson, L. R. 6 Q. B. 276.

Digitized by Google

In this case Riley made with the plaintiff, as far as he was concerned, a valid bargain for the sale of the property in question.

He may have done so without any fraudulent intention, expecting that his co-executors would ratify the transaction. He may have also expected that the plaintiff would consent to rescind the bargain; but plaintiff insisting on his legal right Riley is liable for the damages sustained by plaintiff through the failure of the transaction.

The trial Judge assessed the damages at $150. I think they are not excessive and should be maintained.

In my opinion the appeal should be dismissed with costs.

---

## MANITOBA.

MARCH 4TH, 1905.

FULL COURT.

### REX v. WASYL KAPIJ.

*Criminal Law — Obstructing Religious Services — Criminal Code, sec. 171 — Indictment—Sufficiency—"Unlawfully" —Church Owned by a Religious Society — Intrusion by Members of another Society—Trespassers—Justification for Disturbing Services—Verdict of Jury — No Evidence to Support.*

Reserved case. The accused were tried upon the following charge: That Wasyl Kapij, Nijola Kapij, Anton Brezina, Nicola Komarnicki, and Joseph Krytowski (the accused) on 7th April, 1904, at section 27, in township 18, in range 3 east of the principal meridian in Manitoba, in St. Michael's Church, of the Greek Independent Church, by force, unlawfully obstructed and prevented Dmetro Jarema, a priest of the Greek Independent Church, whilst engaged in celebrating divine service and officiating as priest and celebrant in said church, from celebrating divine service in said church.

The accused were found guilty, but were released upon suspended sentence until the determination of certain points of law raised at the trial. These points were set out by DUBUC, C.J., in a case reserved for the opinion of the Court, the main portion of which case was as follows:

Digitized by Google

It was admitted or otherwise proven in evidence:—

1. That on 7th April, 1904, while Jarema was actually engaged in conducting divine service at the said church, the accused entered the church, and, by force, obstructed and prevented him in and from continuing the said service; and that this action was taken by them deliberately, an arrangement having been previously made by them, with the object of preventing Jarema from conducting service in the church.

2. Jarema was apparently a regular authorized priest of the Greek Independent Church.

3. St. Michael's Church, where the disturbance took place, was subscribed for, built, and dedicated or blessed, some four or five years ago, as a Greek Catholic Church, for the purpose of being used as such, as a part of the Greek Catholic organization in Manitoba and the North-West Territories of Canada; which organization looks to and upon the Pope of Rome as the head of the Church, and to the Roman Catholic Archbishop of St. Boniface as its head in this Province, and the congregation in connection therewith was formed and organized as such Greek Catholic. A grant of the site of the building (comprising 40 acres) was, shortly before the building commenced, formally applied for in writing to the Department of the Interior, Ottawa, by the trustees of the congregation, for the use and benefit of a "Greek Catholic" church (that expression being used in the application), and the fee on such an application was duly paid at the time by the trustees. No proof was given of any acceptance or granting of the application, but the Department appears to have tacitly acquiesced in the building of the church and the use thereof, in accordance with the application. No other application for the land was made until some considerable time after the erection of the building. At the time of the disturbance no disposition had been made by the Department of the application or of the land (apparently in consequence of the church dissensions in regard thereto). From time to time, until 1904, services were held in the church in accordance with the ritual and tenets of the Greek Catholic Church, and a considerable number of the original subscribers of the building fund and members of the congregation have always desired the church to remain a Greek Catholic Church, and have never consented to any change in faith. Whether or not this number formed a majority of the whole congregation at the time of the aforesaid disturbance, is a disputed question. The prisoners Kapij contributed to the subscription and building.

Digitized by Google

4. The Greek Independent Church, of which Jarema claimed to be a priest, was founded during the year 1903. It was independent of the Church of Rome and its members did not recognize the Pope of Rome as the head of their church. Up to May, 1903, Jarema was a member of the Greek Catholic Church. On the first day of May, 1903, Jarema was ordained priest by a Church dignitary named Seraphim, who claimed to a Bishop of the Greek Orthodox Church of Russia. For the purpose of this case I may say that Jarema may be considered as an authorized priest of the Greek Independent Church in accordance with the constitution of that body.

5. On 14th February, 1904, a meeting of the members of the congregation of St. Michael's Church was held at the home of Zelanichi, one of the trustees of the church; and at that meeting Jarema was chosen and appointed a priest or clergyman to hold service in the church. It did not appear whether the meeting was regularly called or not; but those who attended it, with the exception of the accused Wasyl Kapij, unanimously consented to Jarema's appointment. Kapij, however, protested against Jarema's appointment, on the ground that Jarema was not a Greek Catholic priest. The church had been originally organized with five trustees, two of whom were in favour of Jarema's appointment, and three against him. Jarema asserts that out of the whole of the congregation of St. Michael's Church, 45 or 47 members appointed him as a priest and were his followers, while it has been shewn that over 100 members kept to the old faith and did not want him as priest. After Jarema's appointment at the meeting on 14th February, he began holding regular services in the church, and had continued holding such services regularly until the time of the disturbance. Between 14th February and the time of the disturbance, the accused Wasyl Kapij caused a letter to be written to Jarema on behalf of himself and 150 subscribers who claimed to be members of St. Michael's Church, forbidding him to hold service therein, and the three trustees who opposed Jarema had a new lock put upon the church for the purpose of keeping Jarema out, but, notwithstanding this opposition, Jarema continued to hold services, relying upon his alleged appointment on 14th February. The acts of 7th April complained of were done with the approval of the two trustees, who, like Kapij, were opposed to Jarema.

6. No civil proceedings were ever taken by Kapij and his associates to gain possession of the church, prior to the dis-

Digitized by Google

turbance. On 7th April, 1904, after the entry mentioned in paragraph 1, and before the obstruction and prevention there mentioned, the accused Kapij, as the leader of the others, ordered Jarema (stating the aforesaid grounds for the order) to desist from the service and leave the church, which order Jarema failed, neglected, or refused to comply with. Their entry into the church was effected in the ordinary manner, without any force or violence, and, though observed by the others inside, was not opposed or objected to in any way. They were inside some minutes before the obstruction or prevention was commenced, and their right to be there was not then (nor afterwards at the trial or in argument) questioned or disputed in any way.

7. I directed the jury to find the prisoners "not guilty" and that Jarema and his followers had no right whatever to be in possession of the church or to hold services there, having abandoned the old faith under which the church was built, and having accepted another, thereby forfeiting their property in the church; that the church property belonged to those who adhered to the faith upon which they had organized and built the church; and that Jarema was there peacefully, but not lawfully, because the church belonged to another congregation, and that, Jarema being there unlawfully, there was therefore no unlawful obstruction of the priest within the meaning of sec. 171 of the Criminal Code.

8. Notwithstanding my directions, the jury returned a verdict of "guilty," which I refused to accept, and again directed the jury to retire and bring in a verdict of "not guilty;" the jury returned the second time with a verdict of "guilty," which was recorded. Before the jury returned the second time, counsel for the Crown read to me, in the hearing of the jury, a passage from Roscoe's Criminal Evidence, to the effect that if a jury, being sent back to reconsider its verdict, brings in a verdict a second time contrary to the Judge's direction, it must then be recorded.

9. The question for the determination of the Court for Crown Cases Reserved is, whether my direction to the jury, on the point of law stated, was correct or not, and whether a new trial should be ordered or not.

12. This case is reserved on the application of counsel for the Crown.

12a. Counsel for the prisoners demurred to the indictment, on the ground of its containing no allegation that Jarema was then the priest in lawful charge of the church.

Digitized by Google

Counsel referred to and relied upon the form and notes given in Taschereau's Criminal Code, under secs. 171 and 172 of the Code. I overruled the demurrer, but, at the request of counsel for the accused, I reserved a case, on the point, for this Court. If the demurrer should have been allowed, then the verdict should be set aside, and the accused discharged.

13. At the close of the evidence in chief for the Crown, the facts then proven being as hereinbefore shewn, counsel for the accused applied to me to withdraw the case from the jury, on the grounds: (1) that no evidence was given to shew that Jarema was lawfully appointed priest of the church and congregation in question, inasmuch as there was no evidence that the meeting on 14th February, at which he claims to have been appointed, was properly called after proper notice, etc., etc.; (2) that the evidence affirmatively shewed that he could not have been lawfully appointed to the charge of the said church and congregation (at any meeting, no matter how regularly called, or after what notice), inasmuch as the church was built in trust for the propagation of the Greek Catholic religion, and Jarema was not a Greek Catholic, but an avowed Greek Independent, and a number (whether large or small, was contended by counsel to be immaterial) of the founders and beneficiaries of the trust, had expressed themselves as opposed to any change of faith, or any use of the church, by any priest other than a Greek Catholic priest. I thought it better to let the case go to the jury with the direction hereinbefore mentioned; but I reserved a case on this point, at the request of counsel for the accused. If my ruling on the application was wrong, then the verdict should be set aside and the prisoners discharged.

G. A. S. Potts, for the Crown.

F. Heap, for the accused.

The judgment of the Court was delivered by

PERDUE, J.—The charge against the accused is laid under sec. 171 of the Criminal Code, 1892, which is as follows:

"Everyone is guilty of an indictable offence and liable to two years' imprisonment who—

"(a) By threats or force unlawfully obstructs or prevents, or endeavours to obstruct or prevent, any clergyman or other minister in or from celebrating divine service or otherwise officiating in any church, chapel, meeting-house, school-house,

Digitized by Google

or other place for divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place."

At the trial counsel for the accused demurred to the indictment, on the ground that it contained no allegation that Jarema was then the priest in lawful charge of the church. This demurrer was overruled by the Chief Justice, but at the request of the counsel for the accused it was reserved as one of the points for consideration by the Court.

I think the Chief Justice was right in overruling the demurrer. Section 611 of the Criminal Code provides that a count shall be sufficient if it contains in substance a statement that the accused has committed some indictable offence therein specified, and such statement may be made in popular language, without any technical averments or any allegations of matter not essential to be proved. The indictment in this case follows the wording of sec. 171, and lays a charge in conformity with the provisions of the section. There is nothing in sec. 171 which requires an allegation in the statement of the charge against the accused, that the clergyman or minister in question was, at the time the offence was committed, in lawful charge of the church, chapel, &c., in which he was celebrating divine service.

The demurrer should therefore be overruled.

The next point to be determined is whether, in the circumstances stated, Jarema and his followers had any right to be in possession of the church in question, or to hold services there, and whether what occurred on the occasion complained of was an offence upon the part of the accused against the provisions of the Act.

Both in England and in Canada the law has for a long time past made provision for the protection of clergymen and their congregations from disturbance while engaged in the celebration of religious services. The statute 1 W. & M. ch. 18, sec. 18, enacted that if any person shall wilfully, maliciously, and contemptuously come into any cathedral or parish church, chapel, or other congregation, by this Act permitted, and disquiet and disturb the same, he should find sureties and be liable to a penalty. By R. S. C. 1886 ch. 92, sec. 18, it was enacted that any person who should wilfully disturb, interrupt, or disquiet any assemblage of persons met for religious worship, by profane discourse, by rude or indecent behaviour, &c., should be liable to a fine. The Imperial statute from which sec. 171 of our Criminal Code is taken is

Digitized by Google

24 & 25 Vict. ch. 100, sec. 36. The provision in the Imperial statute does not contain the word "unlawfully," which is found in our sec. 171. It appears to me that it was present to the minds of the framers of our Code that there might be a lawful obstruction of a clergyman while officiating in a church, and the provisions of the section were, therefore, aimed at and confined to such persons as should unlawfully obstruct. What then is to be considered an unlawful obstruction within the meaning of the section? It appears to me that the word "unlawfully," in this section, means without legal authority or justification. The word "unlawfully" in this sense should probably be read into the clause in the Imperial statute, as, no doubt, the provision is only intended to apply to unlawful acts of obstruction, etc. In any event, the use of the word in our statute shews that it is not every obstruction of a clergyman while celebrating divine service that is prohibited, but only such obstruction as is unlawful, that is to say, only such as is caused without legal authority or justification.

The word "unlawfully" is found in sec. 333 of the Code in a provision that "everyone who unlawfully and wilfully kills, wounds, or takes any house-dove or pigeon, under such circumstances as do not amount to theft, is guilty of an offence and liable," etc. The corresponding provision in the Imperial statute contains the word "unlawfully," but not the word "wilfully." Under this provision it has been held that where the killing of pigeons, although unlawful, was done for the protection of the party's own property and in the bona fide belief that he was acting in the exercise of a legal right, he was not liable: Taylor v. Newman, 11 W. R. 752; Taylor v. Janes, 32 L. J. Mag. Cas. 186. So also the placing of poisoned meat in an enclosed garden to destroy a dog is not an offence punishable under 24 & 25 Vict. ch. 97 (Imp.), as to unlawfully and maliciously killing, wounding, or maiming any dog, etc.: Daniel v. Janes, 2 C. P. D. 351.

In the present case it was admitted by counsel for the prosecution, for the purposes of the argument, that the right of property in the church belonged to the Greek Catholic Church. Jarema had originally belonged to this church, but, with a number of others of the congregation, he had seceded and had joined the sect known as the Greek Independent Church. Jarema claimed to have been a regularly authorized priest of the last mentioned sect, and was appointed by a minority of the congregation as the priest or clergyman to hold service in the church. Between 14th February and 7th

Digitized by Google

April he held services in the church, although 3 out of 5 trustees were opposed to his doing so.

It is clear that where a portion of a church congregation refuses to adhere to the distinctive tenets imposed upon members of the congregation, and secedes and adopts new tenets or a new belief, it forfeits its rights in the church property: Attorney-General v. Christie, 13 Gr. 495; Attorney-General v. Murdock, 7 Ha. 444; Free Church of Scotland v. Overtoun, [1904] A. C. 515. Jarema and his followers, by joining the Greek Independent Church, had abandoned and lost all property rights in the church in question. Jarema, upon ceasing to be a member of the Greek Catholic Church, and becoming a member of the Greek Independent Church, had no right to officiate as a priest of the last mentioned sect in the church belonging to the other congregation. It was urged, however, that Jerema had, during the above mentioned period, been in peaceable possession of the church, and that there was a bona fide dispute as to the title, which could only be settled in a civil action. I think the acts of Jarema in holding service in the church from time to time formed simply a succession of trespasses, which gave him no right to possession, and there was no shadow of right to the title in, or possession of, the church in him or the portion of the congregation which had seceded from the Greek Catholic Church.

It remains to be considered whether the accused were justified, in the circumstances and for the purposes of this case, in obstructing Jarema in holding services in the church, such services being conducted by a priest not recognized by them, and in accordance with religious doctrines or tenets to which they refused to accede. A majority of the trustees of the church approved of the action taken by the accused on 7th April. The trustees had tried to close the church against Jarema, but without success. No doubt, a civil action to restrain him would have been the proper proceeding, but one can understand how members of a congregation situated as this one was might be tempted to take the law into their own hands. It is easy to imagine a case where a minister or preacher of some obscure sect might, with a few of his followers, intrude himself into a cathedral or church belonging to another religious body, seize the pulpit or high altar, and commence a sermon or service in accordance with his views, in which he might give utterance to doctrines which would be regarded as scandalous and insulting by the regular worshippers in the church. Could it be said that the provision



Digitized by Google

of the Code relied on in this case extended its protection to such a minister and to a religious service conducted in such circumstances? It appears reasonable that those charged with the care and custody of such cathedral or church might interfere and prevent the desecration of their edifice without incurring the penalty provided for obstructing a clergyman.

The indictment lays no charge of forcible entry. The whole matter rests upon the meaning of the section of the Criminal Code above set out. It appears to me that to support a prosecution under that section the clergyman or minister obstructed must be shewn to have been, at the time of the offence, either the lawful incumbent of the church, or to have been holding service with the permission of the lawful authorities of the church. A clergyman who is a mere trespasser or intruder in a church, the congregation of which does not accept his religious doctrines or tenets, may be treated as any ordinary trespasser.

In my view the charge of the Chief Justice at the trial was correct in regard to the point in question.

As there is no evidence to support the charge laid in the indictment, the accused should be discharged.

---

## MANITOBA.

MARCH 4TH, 1905.

FULL COURT.

### RUSSELL v. McKERCHAR.

*Architect—Action for Fees—Counterclaim for Negligence—Questions of Fact—Appeal.*

County Court appeal. Plaintiff, an architect, was employed by defendant to draw the plans and supervise the construction of a brick block, and claimed $223, as a balance due to him for fees.

Defendant disputed payment, and filed a counterclaim for $246, alleging that there were defects in the foundation and roof caused through plaintiff's negligence and carelessness, which defects he was put to extra expense in remedying.

The trial Judge disallowed defendant's counterclaim and gave judgment for plaintiff for $236. Defendant appealed.

C. P. Wilson and D. W. McKerchar, for defendant.

T. M. Daly, K.C., for plaintiff.

Digitized by Google

The judgment of the Court was delivered by

PERDUE, J.—I have carefully considered the evidence in this case, and I see no reason for arriving at a conclusion different from that embodied in the judgment of the County Court Judge.

An architect is bound to exercise reasonable care, skill, and diligence in the preparation of plans and the supervision of work intrusted to him. Whether he has failed or not, in the exercise of those qualities, is a question of fact for the Judge or jury.

The Judge at the trial found the issue upon this point in favour of plaintiff.

In my opinion his finding upon this question of fact should be upheld and the appeal dismissed with costs.

---

## MANITOBA.

MARCH 4TH, 1905.

FULL COURT.

### GIBBINS v. METCALFE.

*Conspiracy—Combination — Injury to Business — Restraint of Trade — Rights of Individuals — Criminal Code, sec. 520.*

Appeal from decision of KILLAM, C.J., 23 C. L. T. Occ. N. 308.

The plaintiff, W. T. Gibbins, who traded as a grain merchant under the firm name of W. T. Gibbins & Co., doing business in the Grain Exchange Building, Winnipeg, brought his action against the defendant T. H. Metcalfe and other members of the Exchange, charging them with having boycotted him by refusing to either buy from or sell to him, and thereby closed off as a market, which he had previously enjoyed, the Grain Exchange building and the firms and individuals doing business therein. This action on the part of defendants, plaintiff alleged was unlawful and improper, and he claimed $50,000 damages.

It appeared from the evidence that defendants for some time previous to the autumn of 1903 had come to the con-

Digitized by Google

clusion that plaintiff was using the Grain Exchange market as a means for selling the grain and produce of non-members of the institution, in direct violation of the rules and by-laws of the exchange. They called his attention to this, and it was alleged that plaintiff informed them that he would deal with whomsoever he pleased. They then had a meeting, and decided to do likewise, or, as plaintiff put it, "boycotted" him. Defendants maintained that they had a perfect right to trade with any person they wished, and to refrain from dealing with anybody they chose not to deal with, and that this action, or inaction, on their part, was perfectly just and legal and could not be construed into what has been called a "boycott." They absolutely denied that they had exercised any animus towards the plaintiff.

Plaintiff denied the charges made as to his dealing with "outside parties" as the defendants alleged, but they, notwithstanding this, alleged that he had been doing so, and thereby making a larger commission than they, by observing the rules of the exchange, could make.

KILLAM, C.J., dismissed the action with costs.

A. J. Andrews and T. J. Murray, for plaintiff.

H. M. Howell, K.C., F. H. Phippen, and H. Phillips, for defendants.

The judgment of the Court was delivered by

DUBUC, C.J.—After plaintiff's counsel had closed his argument in support of the appeal, both on the questions of fact and of law, we intimated that, in our opinion, the findings of fact of the trial Judge were clearly borne out and justified by the evidence; and we called on defendants' counsel to confine their argument to the questions of law raised in the case.

To summarize the findings of the material facts of the case; the Judge found that the defendants did combine and agree together not to deal with the plaintiff and other persons who refused to comply with the rules adopted by the Grain Exchange in respect of the purchase and sale of grain; that the plaintiff's business was damaged by the effect of said combine; that it was not sufficiently proven that defendants had attempted to induce other persons, firms, or corporations, to refrain from dealing with the plaintiff; that the defendants in so combining were not actuated by any malicious feeling towards plaintiff, but solely by the desire to serve the business interests of themselves and those for whom they were acting,

Digitized by Google

and of the members of the Grain Exchange generally, and for the protection of the market created under the rules of the Grain Exchange. On these facts the Judge held under the authorities that the object aimed at and carried out by defendants was not unlawful and did not give plaintiff a cause of action against them.

I have examined the numerous cases cited in support of plaintiff's contention. The gist of those authorities seems to be that a combination, although resulting in damage to some person or persons, is actionable only in cases where its object is unlawful or, if lawful, it was obtained by unlawful means. As held in Allen v. Flood, [1898] A. C. 1, if defendant has done no unlawful act, if no legal right of the plaintiff has been violated, however malicious or bad may be the motive of defendant, his conduct does not give rise to a cause of action.

In the Mogul Case, [1892] A C. 29, it was held that since the acts of the defendants were done with the lawful object of protecting and extending their trade and increasing their profits, since they had not employed any unlawful means, plaintiff had no cause of action.

The principles laid down in those authorities are applicable to the present case.

Defendants agreed between themselves and with other members of their corporation not to deal with plaintiff. They did not do so for the purpose of injuring him in his business, or from any other malicious or bad motive; they asked him to conduct his dealing in grain according to the rules which had been established by the Grain Exchange for the protection of their business interests, and warned him that, unless he did so, they would cease to deal with him. He claimed the privilege of dealing with whom and in what manner he pleased, without regard to the rules adopted by the corporation. Defendants claimed that they had the same privilege, and told him that on that account they would cease to deal with him. They did not attempt to coerce him by violence or threats, or induce him to break any contract he might have entered into. What legal right of plaintiff have they violated? Their object was certainly not unlawful, and they did not use unlawful means to carry it out.

All the points raised and the most important authorities bearing on the case have been well considered in the able and elaborate judgment of the trial Judge; and, agreeing as we do with his views and conclusions, we feel that we may properly adopt his judgment as our own.

The appeal should be dismissed with costs.

Digitized by Google

## BRITISH COLUMBIA.

### (VICTORIA.)

HUNTER, C.J. FEBRUARY 23RD, 1905.

CHAMBERS.

### DICKINSON v. ROBERTSON.

*Execution—Exemption from Seizure—Option of Debtor.*

Motion by defendant W. A. Robertson for an order allowing a claim to exemption, in pursuance of the Homestead Act, R. S. B. C. 1897 ch. 93, secs. 17 and 18, and restraining the sheriff of the county of Victoria from selling the goods and chattels which the applicant was entitled to have exempted from seizure and sale in pursuance of such sale.

On 14th February, 1905, an execution against the goods of the applicant was issued out of a County Court, and on the same day the sheriff seized her goods in her house in Victoria; on a previous occasion when an execution had been issued against her son's goods she had given the sheriff a list of the goods on Moresby Island belonging to her: on the day of the seizure of the goods in Victoria the sheriff notified the applicant of the seizure, and also that the goods on Moresby Island were under seizure, but it was not until 15th February that the latter goods were actually taken possession of by the sheriff and the applicant became aware of it on the 16th On the 18th defendant made a selection of $500 worth of goods as being exempt from seizure.

C. J. Prior, for the applicant.

F. Higgins, for the execution creditor and the sheriff. The exemption is a privilege which must be claimed within two days after seizure or of notice thereof: see In re Ley (1900), 7 B. C. 94, and Sehl v. Humphreys (1886), 1 B. C. (pt. 2) 257. The seizure in Victoria, together with the notice on the 14th that the goods on Moresby Island, the sheriff having a list from the applicant herself, were under seizure, operated as a seizure on the 14th of the goods on Moresby Island: Balls v. Thick (1845), 9 Jur. 304.

HUNTER, C.J.—It is idle to say that there was a seizure before the 15th: you might just as well talk of a seizure by telephone.

Digitized by Google

As to the question of the debtor's right of exemption, in spite of the cases cited I strongly incline to think that it is absolute, and not a mere privilege to be asserted within the two days on peril of the loss of everything. The effect of the statute is that the debtor may select the $500 worth within the two days, but, if he does not, the sheriff is to leave $500 worth behind. Suppose the debtor too ill to think of exemptions, was it intended that he should be left destitute, or does the law regard life more than the debt? Or suppose he is absent and his notice goes astray, must he go home and find not even a stove to cook his food in? I need not, however, come to any final conclusion as to this, as I have no doubt that the claim was put in within the time allowed. But, as the sheriff contends that the goods claimed as exempt have been undervalued, the matter will stand over to allow the proper proceedings to be taken to settle that question, and to enable the debtor to answer the sheriff's affidavit on the point of waiver. As to whether the right can or cannot be waived I express no opinion now.

---

## BRITISH COLUMBIA.

### (VICTORIA.)

FEBRUARY 27TH, 1905.

FULL COURT.

### BROWN v. SPRUCE CREEK POWER CO.

*Mines and Minerals—Water Rights—Jurisdiction of County Court—Placer Mining Act—Concurrent Action—Water Record—Status to Attack—Water Clauses Consolidation Act — Gold Commissioner — Application to — Parties— "Layman"—Form of Record.*

Appeal by defendants from judgment of HENDERSON, Co.J., in favour of plaintiffs in an action tried in Atlin. The action was brought in the County Court (mining jurisdiction), under part 10 of the Placer Mining Act, R. S. B. C. 1897 ch. 136. Plaintiffs claimed an injunction and a mandamus to compel defendants to allow sufficient water in Spruce Creek to flow past defendants' intake to satisfy plaintiffs' alleged prior existing rights. By the judgment it was adjudged that plaintiffs were entitled to have 600 miners' inches

Digitized by Google

of water, if and when there may be so many, in Spruce Creek, flow past defendants' intake; and defendants were restrained from diverting water contrary to the rights of plaintiffs as declared by the judgment.

The appeal was heard by HUNTER, C.J., MARTIN and MORRISON, JJ.

A. L. Belyea, K.C., for appellants.

A. D. Taylor, for respondents.

The judgment of the Court was delivered by

MARTIN, J.—As regards the first point respecting the jurisdiction of the County Court, I see no reason to reverse the Judge's decision, or to depart from the recent judgment of Duff, J., delivered 17th September, 1904, in Spruce Creek Power Co. v. Muirhead, 11 B. C. R. 68, wherein he held that the County Court has jurisdiction in actions of this kind under sec. 133, sub-sec. (4), and also under sub-sec. (1), of the Placer Mining Act.

It is also contended that, even if the County Court has concurrent jurisdiction with the Supreme Court in this action under sec. 133, and also sec. 143, yet because an action was begun on the same issues in the Supreme Court between the present defendants as plaintiffs and the present plaintiffs and others as defendants, 8 days before the present action was brought in the County Court, therefore the jurisdiction of the latter Court is ousted; and counsel cites the following extract from the Encyc. of Pleading and Practice (1898), vol. 12, pp. 151-2:—

"It is a settled rule that when two courts have concurrent jurisdiction over a particular subject-matter, the one which first takes cognizance of a cause falling thereunder will retain the jurisdiction throughout, to the exclusion of the other, and until final determination. . . . This rule rests upon comity and the necessity of avoiding conflict in the execution of judgments by independent courts, either of distinct or concurrent jurisdiction. Any other rule would unavoidably lead to perpetual collision and be productive of most calamitous results."

Now, in the first place, the parties in the two actions are not the same, because there were 9 defendants in the Supreme Court action, instead of the 3 now before us, and the American authority relied on, at p. 152, shews that in order to

Digitized by Google

apply it "the suits should be between the same parties, seeking the same remedy, and apply to the same question." But further than this, our practice is different, and it is, that though the jurisdiction exists yet the proper course is to apply to stay one of the actions. In the Encyc. of the Laws of England, article "Staying Proceedings," vol. XI., p. 724, it is stated that:—

"If the concurrent actions are pending, say, in the High Court and the County Court, or any other Court in this country, raising the same issues, the maxim nemo bis vexari debet in eadem causa applies, and the Court will, as a rule, allow the action which was commenced first to proceed, and stay the other (but see Thompson v. South-Eastern R. W. Co., 46 L. T. 513); unless, indeed, a decree has already been made in either action, in which case that decree will stand, but the conduct of the proceedings will be given to the plaintiff who first issued his writ. . . ."

And in addition to the authorities cited see Wedderburn v. Wedderburn, 2 Beav. 208. In Thomson v. South-Eastern R. W. Co. it was held by the Court of Appeal that there was no hard and fast rule as to which action would be stayed and that the Court would exercise its discretion on the facts before it. Other authorities will be found collected in the Annual Prac., 1905, vol. 2, p. 429; and Yearly Prac., 1905, pp. 38-9.

Speaking generally, it would seem to be clear that either of two Courts having jurisdiction will continue to exercise it till objected to.

As between conflicting County Courts in this Province, where the property is in different jurisdictions, sec. 136 provides that the Court "before which the dispute is first brought shall decide it."

By means of the special and simple procedure of its mining jurisdiction, the County Court is enabled to try mining disputes much more speedily than the Supreme Court. Section 137 provides that "the hearing of any summons, plaint, or other process in any County Court shall not be deferred beyond the shortest reasonable time necessary, in the interests of all parties concerned, and it shall be lawful for the registrar to make summonses or other proceedings returnable forthwith, or at any other time."

And, sometimes, it is of the first consequence to the litigants to get judgment as soon as possible, otherwise heavy loss would follow, of which this very case is an instance in

Digitized by Google

point, and this feature would have much weight in an application to stay. But the defendants at the trial herein, instead of objecting to the celerity of the proceedings, objected to any delay therein, and pressed the Judge for an early decision. In such circumstances it is too late to complain of a want of jurisdiction on this head: Gelinas v. Clark, 1 M. M. C. 428, 8 B. C. R. 42; and see Ex parte Pratt, 12 Q. B. D. 334, per Bowen, L.J., at p. 341.

In this question of jurisdiction the recent decision of Duff, J., in Muirhead v. Spruce Creek Power Co., delivered on 13th September, 1904, 11 B. C. R. 1, should be considered; it is to the effect that a mining action in the County Court may, under sec. 34 of the County Courts Act, be stayed pending trial in the Supreme Court.

Then, as to the second point, that no one has a status to attack a water record unless he holds a water record himself. This is the view of the Judge as expressed in the case just cited, thus:—"In order to acquire a status to complain about the diversion of water, any subject—be he free miner or otherwise—must acquire a water record, as the Water Clauses Consolidation Act now stands. My view is, that the Act constitutes an exclusive code on the subject of water rights in this province . . . No person not having such a record, in my judgment, has any status whatever in a Court to make any complaint about the misuse of water by the holder of a record."

Subject to what follows I see no reason, at present at least, to differ from his Lordship, interpreting his language in the sense that one who seeks to attack a record under that Act must also have a status thereunder. Such a status is specially given to placer miners in certain circumstances by sec. 29 of the Water Clauses Consolidation Act, as amended in 1904, ch. 56, sec. 2, as follows:—

"29. In any case where all the water in any stream has been recorded for mining purposes, and placer mines, either before or after the date of such record, are located and bona fide worked either above or below the point of diversion, the owner or owners of such placer mines shall be entitled to the continuous flow in said stream past, or to divert into or upon or through, such mine or mines 60 inches if 200 or less be diverted by such record, and 90 inches if 300 inches be diverted by such record, but no more; and such owner or owners shall be entitled to the full use of such water for such distance above or below such mine or mines as shall be necessary for the continuous and economical workings of said

Digitized by Google

mine or mines and the carrying away of tailings and debris arising therefrom: provided, however, that such owner or owners may divert a greater quantity than above specified, upon paying to the holder of said record compensation for the damage he may thereby sustain; and in computing such damage the costs of the ditch shall be considered."

It is admitted that the plaintiffs are free miners working on the creek in question and entitled to invoke this section, and their counsel contends that its effect is to confer upon them a statutory record for the specified number of inches, in this case 90, without the necessity of any application, and that, consequently, they have a statutory status to attack the holder of any record who is misusing the water granted to him or failing to comply with the conditions of his record to their disadvantage. I am clearly of the opinion that this is the case (see secs. 7, 18, 28, 140, and definition of "Unrecorded Water"), and that sec. 29, where it applies, is intended to prevent the necessity of a multitude of applications being made for small amounts of water, and that any one who is entitled to invoke the section is in the same position as if he held the customary written record for the amount of water allowed him by the section. And I agree with my brother Duff that the whole Act is intended to be "the rock of defence both to the small proprietor and the individual miner against anything in the nature of a misuse or a monopoly of the water."

The third objection is, that the application of Storey and other individual miners on that creek should not have been even entertained by the Gold Commissioner, and reliance is placed on the language of Mr. Justice Drake in an appeal from a decision of my own under this Act in Centre Star Mining Co. v. British Columbia Southern R. W. Ry. Co., 1 M. M. C. 460, 8 B. C. R. 214, wherein the full Court upheld my view that a joint application could be made by two distinct companies being the owners of two different lode mines which were not adjoining. On the actual point at issue the case when properly understood is really an authority against the appellants, who now invoke it, because the judgment of the full Court says that "If more persons join in an application than the law contemplates, or if some of the uses for which the water is to be put are not in his opinion correct, he (the Commissioner) has power to make the record, omitting those matters which are in his opinion incorrect, just as much as he has power to limit the amount of water to be used," &c., &c.

Digitized by Google

It is true the learned Judge goes on to say (p. 464) that "The intention of the Act, it appears, from a general view of its provisions, is that any mine owner or number of mine owners interested in one claim may apply, or owners of a group of mines under control of one company or partnership may join in an application, but not several owners of separate and distinct mines with no proprietary connections; if such a course was allowed, very great difficulty might arise. Without enumerating such difficulties, it is sufficient to say that in my view such a proceeding was not in contemplation of the framers of the Act, which was to enable the waters of the province to be separated for the use of all miners and not to be absorbed for scattered miners under one application."

But it must be remembered that he is speaking only of applications relating to lode claims, and that considerations of a very different sort apply to this case, where there are a number of individual placer miners on the same creek who not only have peculiar rights under sec. 29, but have one paramount interest in common, viz., to secure a continuous supply of water, which they are using in close succession one after the other during the short season in which their claims can be worked. Miners so operating do not come within the proper meaning of the term "scattered miners" as employed by my brother Drake, and indeed in one sense they have a common "proprietary connection" of a special and vital kind in the water of the stream under and by virtue of sec. 29. Though from one point of view their claims may be "separate and distinct mines," yet their common interest and the operation of the section may serve to connect them in such a way that it will often be found impossible to "disconnect" them when considering the best means to practically apply the status; it all depends on the varying circumstances which the Gold Commissioner will have to deal with on the spot.

I am of the opinion, therefore, that the Gold Commissioner acted properly in the circumstances in entertaining the joint application of Storey and the other individual miners concerned, who, in fact, made their application in that manner at the suggestion of the Gold Commissioner. I do not see how he could have acted otherwise, for, as has been seen, these men were already in effect holders of statutory records and entitled to attack existing records and have them cancelled, reduced, or imposed with new conditions, under secs. 18 and 28 if they shewed good cause therefor. Indeed, it facilitated matters and gave the Gold Commissioner a freer hand to have them all before him in the one interest. And it was also

Digitized by Google

proper to hear the three conflicting applications of Banon, Smaill, and Storey et al. at the same time, for sec. 18 requires him to "hear all parties in interest and their witnesses," and make his "adjudication" thereon. He did hear all the parties, and the course he adopted in provisionally reducing record No. 37 by 200 inches and record No. 73 by 100 inches, a total of 300 inches, in favour of the individual miners as a body, until their claims were worked out or abandoned, seems to have been the only practical way of dealing with the matter. It is objected that this does not constitute a grant of a record in their favour, but, as has been seen, they were already in the position of record holders by statute, and all that it was necessary to do in such case to guard their rights was to amend or modify the existing records by attaching new conditions thereto. An interim record could not have been granted under sub-sec. (3), for that only applies to records "obtained under any Act heretofore passed," and all the records in question had been granted under the existing Act. The reduction was made, and either sec. 18 or 28 would justify the step taken, and the Gold Commissioner took the precaution of immediately sending copies of his adjudication to the Mining Recorder, to the Chief Commissioner of Lands and Works, and to each of the parties, so that all concerned had express notice thereof. Nothing more is required to be done even in the case of a new grant: see sec. 15, sub-sec. (3).

It was perhaps, strictly speaking, incorrect for the Gold Commissioner to say in his decision that "the said 300 inches shall be considered as granted in response to the said application of Thomas Storey and others in lieu of a record and as appurtenant to the individual claims above designated, yet, if the action taken was the proper one, on the ground that the individual miners already had statutory grants, it will not be invalidated because the official used inapt language or erred in thinking he had power to make a grant "in lieu of record," which is something the statute does not authorize. The point is, that what he did in reducing the two records was lawful, though apparently, and very excusably, he did not appreciate the exact rights or status of the individual free miners in the circumstances.

In addition to the said 300 inches, there was also another record, No. 15, Martin's, for 300 inches, which was admittedly prior to Banon's, and this made in all 600 inches which plaintiffs must allow to pass their intake, and on 24th August, 1904, with the apparent intention of implementing his

Digitized by Google

adjudication of 10th August, 1903, as amended on 25th August of the same year, the Gold Commissioner ordered defendants to allow that amount to pass their intake, which they refused to do, and hence this action. This order is not in the appeal book, as it should be, though it is referred to in the plaint in par. 8, and was twice referred to at the trial and was cross-examined on and discussed by plaintiffs' counsel, and the measurements directed to be made under it also discussed. Mr. Belyea says it was in the form of a letter, but that he cannot recollect its terms. However, there is no dispute about its general effect as above stated, though we are in the dark regarding the exact circumstances which led up to its being made. But it is not necessary to consider it further, for it does not carry the case beyond the original adjudication, and is only supplementary. Having given, then, his formal adjudication and placed it on record, it was open to any one who felt aggrieved thereby to take that appeal "in a summary manner" to a Judge of the County Court, or of this Court, that sec. 36 provides, i.e., by filing a petition "within one month after the day such decision is recorded." It is difficult to understand why defendants, or their predecessors in title, did not adopt this course if they were not satisfied with the decision, but, since they have not seen fit to do so, they are bound by it.

On the facts it is clear from even defendants' own witnesses that 600 inches are not too much to allow to pass the intake for the use of the various prior interests concerned, and the decision of the trial Judge should be affirmed on that ground also. If less than that amount had been allowed, the individual miners would not get their 300 inches, for, in addition to the prior Martin record for 300 inches, one Queen also had an admittedly valid prior one, No. 83, for 100 inches, which he was using.

It was argued by Mr. Belyea that the holder of a lay on a claim could not apply for or obtain a water record, and that only a recorded owner of land or a mine could do so. Section 10 declares that "Every owner of a mine may secure the right to divert unrecorded water from any stream or lake for any mining purpose . . ." Section 18 declares that "Any owner of land or owner of a mine who would be entitled to apply for a record of the water in any stream or lake, if the same were unrecorded," may get leave from the Gold Commissioner to apply therefor "notwithstanding the existence of such prior records . . ." The term "owner of a mine" is thus defined: "'Mine' shall include 'claim' and

Digitized by Google

'mineral claim,' and shall mean any land held or occupied under the provisions of the mining laws of the Province, for the purpose of winning and getting therefrom minerals, whether precious or base, and whether held in fee simple or by virtue of a record or lease, and 'owner of a mine' shall mean owner of a mine as above defined." Now, a "layman" is really a leaseholder and an occupant of a claim within the meaning of that definition, the peculiar feature of his tenure being that the amount of the rent he pays is contingent, since it depends upon the clean-up, and he is bound to work the claim continuously in a miner-like manner during the mining season. The claim cannot be worked without water, and therefore, after getting his lay, his first duty to his lessor as well as to himself must be to get a water record, if one is not already appurtenant to the claim by statute or otherwise. For this purpose he must, from the very nature of a lay, be deemed, in the absence of evidence to the contrary, to represent the owner as well as himself, and therefore is entitled without further authority to apply for a record to the claim, if it be necessary to do so. There is nothing restricting the right to recorded owners merely, and it would be surprising to find such a restriction, for the record is not made appurtenant to the applicant but to the mine, according to sec. 19: —"19. Every record obtained by the owner of land or the owner of a mine shall be deemed as appurtenant to the land or mine in respect of which such record is obtained. (2) All assignments, transfers, or conveyances permitted by law of any mine or of any pre-emption rights, and all conveyances of land in fee, whether such assignments, transfers, or conveyances were or shall be made before or after the passing of this Act, shall be construed to have conveyed and transferred, and to convey and transfer, any and all recorded water privileges appurtenant to the premises assigned, transferred, or conveyed, and shall pass with any of the premises aforesaid upon devise or descent." And by sec. 20, the record exists only so long as the mine does:—"20. Whenever a mine shall have been worked out or abandoned, or a pre-emption cancelled or abandoned, or whenever the occasion for the use of the water upon the mine or pre-emption shall have permanently ceased, all records appurtenant thereto shall be at an end and determined." In sec. 29 the expression "owner of such placer mines" is clearly intended to include a layman; to seriously contend otherwise, bearing in mind the way placer mining operations are carried on, seems to me to be impossible.

Digitized by Google

Some discussion arose on the proper form of a water record, and it is strange that one is not given in the Act, which gives rise to some uncertainty on the point, for while the interpretation section says that "record" shall "mean an entry in some official book kept for that purpose," yet sec. 15 contemplates something more formal, for it provides that "The record granted upon such application shall be forthwith entered by the Commissioner, or Gold Commissioner, in the book of record of water rights, and shall contain the particulars required to be contained in the notice of application, as confirmed by or modified upon the adjudication, and any particulars directed to be inserted therein by regulations in that behalf, with such additions and variations as circumstances may require." But, from the course the appeal has taken, it is unnecessary to decide the point here, and I merely draw attention to it so that it may receive consideration in the proper quarter. It is true that a printed form has been adopted in practice, but we are informed it is not authorized by rule of the Lieutenant-Governor in council under sec. 142, for none has been made.

On the whole case, I am unable to discover any good reason why the judgment of the trial Judge should be disturbed, and therefore the appeal must be dismissed with costs.

---

## NORTH-WEST TERRITORIES

### (SASKATCHEWAN.)

PRENDERGAST, J. FEBRUARY 13TH, 1905.

CHAMBERS.

### MOYIE LUMBER AND MILLING CO. v. MAY.

*Judgment by Default—Motion to Set aside—Defence—Counterclaim—Security for Costs—Summons or Notice of Motion—Affidavit of Merits—Security in Hands of Defendants.*

Plaintiffs, an incorporated company doing business at Moyie, in British Columbia, supplied defendants, doing business in partnership at Saskatoon, Saskatchewan, with certain cars of lumber, and drew bills of exchange upon defendants for $1,413.34, the price of the lumber. Defendants accepted the drafts before the lumber arrived. When the lumber arrived at Saskatoon, it was held for 7 days on the railway company's siding, and $123 demurrage charges incurred.

Digitized by Google

These demurrage charges were paid by plaintiffs, and the lumber delivered to defendants. When the bills became due, they were not paid, and plaintiffs brought this action to recover the amount of the bills and the demurrage charges advanced by them. Judgment by default was signed against the defendants on 15th December, 1904, and execution issued on 19th December.

Defendants moved to have the judgment set aside, alleging that the lumber supplied by plaintiffs was of an inferior quality to that ordered, and that they had a good counterclaim against plaintiffs for damages on that account. Defendants also moved for security for costs.

J. H. Lamont, Prince Albert, and A. Turgeon, Prince Albert, for defendants.

J. McKay, K.C., for plaintiffs.

PRENDERGAST, J.—I do not think it necessary to review the decisions which were cited both in support of and against this application, inasmuch as they refer to cases where part failure of the consideration for the notes or bills therein sued upon was made a matter of defence proper, as distinguished from defence by way of set-off and counterclaim. Here, upon the facts alleged by defendants, they undoubtedly could have counterclaimed in damages whether liquidated or not, and it is now a matter purely discretionary with the Court, and which as such should be decided mainly on the merits, whether or not judgment should be set aside in whole or in part.

The affidavit of Mr. Ferguson, on which the application wholly rests, does not, to my mind, establish a sufficient case —not at all events as to the first item of the claim; no better reason is assigned there to explain the default than that, on the day when the time for filing a defence expired, defendants served plaintiffs' solicitor with a notice of motion for security for costs and for a stay of proceedings, which of course is no explanation at all. Then, on such applications as the present one, the grounds of defence should as a rule be fully set out; and here, while defendants allege that the lumber which they admit having ordered from plaintiffs and accepted, was "not of the quantity and material ordered, but of much inferior quality," no particulars at all are given whether as to quantities or otherwise, nor is even the approximate amount of damages shewn. I have also before me, as



Digitized by Google

to the general merits of the case, the very material facts disclosed in the examination for discovery of Fleming May, one of the defendants; more particularly that a considerable quantity of the very material for which the bills sued upon were given was used, not in the ordinary course of their (defendants') business, but to pay a debt then owing another wholesale lumber concern, at a time when defendants' firm was and had been for some time already hopelessly involved. The Court records, moreover, shew that on 18th January last plaintiffs signed another judgment for default against defendants on a claim of $2,163.20, also for accepted bills of exchange, and have still another action pending against the same defendants for $600 damages.

Upon the above facts, and considering that it is yet left open to defendants to proceed by cross-action for the damages resulting from the alleged inferior quality of the lumber, I think the application should be refused, at all events as to the $1,413.34 claimed upon the bills. As to the $123 alleged by plaintiffs to have been paid by them for demurrage, at defendants' request, the position is not the same, inasmuch as the judgment, were it allowed to stand as to this item, would be res judicata, and I do not see by what form of action defendants could have any redress if they have in fact a good defence. Then, the affidavit read for defendants is also much more satisfactory on this point.

As to this last item, then, I think the application should be granted, with costs to plaintiffs.

Upon payment to plaintiffs of the said costs, which I fix in all at $12, defendants shall be entitled to take out an order, within 12 days from the date hereof, setting the judgment aside as to the item of $123, and allowing them to defend as to that item, within 6 days from the service of the order on plaintiffs' solicitor.

The application for security for costs should be by summons, and not by notice of motion: Rule 520, J. O.

There is no allegation that defendants have a good defence upon the merits, in the affidavit read in support of the application: ib.

Then, on the merits, on the facts shewn upon the application to set aside judgment, made part of the present application, I would say, in the words of Stirling, J., in In re Contract and Agency Corporation, 87 L. J. Ch. 5, 6, "They (the defendants) have in their hands the very security they are asking for."

Application refused; costs to the plaintiffs.

Digitized by Google

## NORTH-WEST TERRITORIES.

### (SOUTHERN ALBERTA.)

HARVEY, J. FEBRUARY 18TH, 1905.

CHAMBERS.

## GALLEY v. GALLEY.

*Contempt of Court—Disobedience of Order for Interim Alimony—Order for Payment of Money.*

Action for alimony. Plaintiff obtained from SIFTON, C.J., an order dated 26th November, 1904, for payment to plaintiff of $25 per month interim alimony until the trial. Defendant made default in the payment due 1st February, 1905, and plaintiff obtained a summons for an order to commit defendant for contempt.

N. D. Mills, Strathcona, for plaintiff, moved the summons absolute.

J. R. Boyle, Edmonton, for defendant, shewed cause.

HARVEY, J.—The Court has no jurisdiction to make the order. This is an order for the payment of money only. The English Debtors Act, 1869, is in force in the N.W.T. By virtue of this Act no one can be committed for the non-payment of a sum of money. This is an order for payment of money, and is so construed in England: see Lynch v. Lynch, 10 P. D. 183; also Bates v. Bates, 14 P. D. 17; Seton on Decrees, vol. 1, p. 386.

Our Judicature Ordinance has not copied the English Rules respecting attachment. Rule 337 of our Ordinance is Eng. R. 580, but Eng. Rules 581 and 582 are omitted. Eng. Rules 586, 620, and 621 are not in our Act.

This order can be enforced by execution under Rule 338, Judicature Ordinance, and that is plaintiff's only remedy.

As the order sought to be enforced by attachment for contempt did not, as in the English cases cited, contain the alternative of giving security, it was an order for the payment of money within the Debtors Act, 1869, and therefore could not be enforced by attachment for contempt.

Whether this Court has jurisdiction to make an order in the alternative form permitted under the English practice, quære.

Digitized by Google

## NORTH-WEST TERRITORIES.

### (SOUTHERN ALBERTA.)

HARVEY, J. FEBRUARY 18TH, 1905.

CHAMBERS.

### JOSHUA HANDY MACHINE WORKS v. PACE.

*Security for Costs—Action on Foreign Judgment—Merits of Defence.*

Action on a judgment recovered in British Columbia. The main ground of defence was, that the foreign judgment was obtained against defendant in his absence and by fraud, no particulars being set out.

Plaintiffs lived out of the jurisdiction, and defendant applied for an order for security for costs. The examination of defendant for discovery was read, from which it appeared that he asserted that he was not liable for the whole amount sued for in the foreign action; that he was represented by counsel on a summary application for judgment, and being away from home had sent him an affidavit, which was found to be insufficient to prevent judgment going, and that his counsel had told him that the judgment was wrong.

W. de V. Le Maistre, Edmonton, for defendant.

C. F. Newell, Edmonton, for plaintiffs, argued that a foreign judgment could be attacked only on the grounds, (1) of want of jurisdiction, (2) non-personal service, or (3) fraud; that it was clear that none of these grounds could be established; and there being, therefore, clearly no legal defence, the order requiring security for costs to be furnished should not be granted.

HARVEY, J., held on the authority of Crozat v. Brodgen, [1894] 2 Q. B. 30, that on an application for security for costs the question of the merits of the defence should not be gone into; and the order was granted.

Digitized by Google

## NORTH-WEST TERRITORIES.

### (SOUTHERN ALBERTA.)

HARVEY, J. FEBRUARY 18TH, 1905.

CHAMBERS.

## IMPERIAL BANK OF CANADA v. TWYFORD.

*Receiver—Equitable Execution—Rents of Mortgaged Lands.*

Plantiffs had recovered judgment against defendants for a large amount, and had caused writs of fi. fa. goods and lands to be issued and placed in the sheriff's hands. A small amount had been levied under the fi. fa. goods. Certain moneys had also been garnished. The fi. fa. lands was filed in the Land Titles Office, but there was no prospect of realizing the full amount of the judgment thereon.

Plaintiffs applied to have certain shares of stock owned by defendants in a public company charged with the amount of the judgment, also to have a receiver appointed to receive the rents and profits of two lots in Edmonton owned by one of the defendants, subject to a mortgage.

The Judicature Ordinance, sec. 10, sub-sec. 8 (practically the same as the section in the English Act), provides that "a mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court or Judge in all cases in which it shall appear to the Court or Judge to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Court or Judge shall think just," etc.

The granting of the charging order on the stock was not contested.

S. E. Bolton, Edmonton, for plaintiffs, referred to Kerr on Receivers, 4th ed., pp. 48, 49, 50; Kirk v. Burgess, 15 O. R. 608; Hills v. Webber, 17 Times L. R. 513; Snow's Annual Practice (1905), Marginal Rule 672, pp. 706, 707, 708; Re Pope, 17 Q. B. D. 749; In re Coney, Coney v. Bennett, 29 Ch. D. at p. 995; Anglo-Italian Bank v. Davies, 9 Ch. D. at pp. 282, 286; Tillett v. Nixon, 25 Ch. D. 238; Salt v. Cooper, 16 Ch. D. 544; Walmsley v. Mundy, 13 Q. B. D. 811; Westhead v. Riley, 25 Ch. D. 413; Bryan v. Bull, 10 Ch. D. 153; O'Donovan v. Goggin, 30 L. R. Ir. 579; Ex p. Evans, 13 Ch. D. 260.

Digitized by Google

O. W. Biggar, Edmonton, for defendants, contended that the English cases went to shew that a receiver will be appointed only in cases where the property with respect to which such appointment is asked for is one in which the defendant has only an equitable interest, and which cannot be reached by the ordinary process of legal execution; that where the judgment creditor has a legal remedy a receiver will not be appointed; that in this case the rents could be reached by the legal process of attachment of debts; that Kirk v. Burgess, 15 O. R. 608, should not have weight here, as in Ontario the mortgagor has only an equitable estate in the land, while in the Territories the mortgagor has the legal estate; that at any rate that decision goes too far in the face of the English decisions on the subject. He cited Harris v. Beauchamp, [1894] 1 Q. B. 801, and Manchester, etc., District Bank v. Parkinson, 22 Q. B. D. 173.

HARVEY, J., held that it was a proper case for the appointment of a receiver of the rents; and the order was granted, subject to the rights of prior incumbrancers.

---

## NORTH-WEST TERRITORIES.

### (SASKATCHEWAN.)

PRENDERGAST, J. FEBRUARY 27TH, 1905.

TRIAL.

### KLASSEN v. WRIGHT.

*Bailment — Hire of Horses — Negligence of Bailee—Loss of Horses—Contributory Negligence of Bailor.*

Action by a livery stable keeper to recover $325 for the loss of two horses and damage to a buggy.

G. O. McHugh, Rosthern, for plaintiff.

G. E. McCraney, Rosthern, for defendant.

PRENDERGAST, J.—Defendant last summer hired from plaintiff, who is the keeper of a livery stable at Rosthern, two horses and a buggy to go to Duck Lake with his wife. Defendant says that on the way out the knobs attaching the braces to the top of the buggy caught between the wheels

Digitized by Google

three times, and that, the first time, he left the lines on the dash board and pulled it (the top) up. The second time he "pulled it up without getting off," and the third time he "got off and yanked it out." Plaintiff, however, and two others swear that the buggy was in good condition, and a third witness, Parnell Whybra, veterinary surgeon, who seems to have been familiar with conditions about the livery, says: "It was the best in the barn—an easy buggy—the top could be made to come down between the wheels with unreasonable speed and on rough roads—on a good road it could hardly occur. But turning a corner, and in a hole, and with enough speed it would do that. It had side springs. It was a safe buggy to let out on such a trip. I think I can say this buggy has no weak spring."

Defendant at all events proceded to Duck Lake, where he left his wife, and some time in the evening set out on his way back to Rosthern with a friend, one Ritz. It appears that when two and a half miles south of Duck Lake, the top of the buggy again caught in the wheels, and defendant, after putting the reins on the dashboard, "yanked it up," whether simply by reaching behind or after getting down is somewhat uncertain under the evidence. At all events, when about three or four miles from Rosthern they came to a bad spot; it was pretty dark by this time. Some one who was following in another conveyance said "it looks pretty bad." Defendant said, "I know a better road," and drove his horses, as he says, a kind of trot down the grade, and the brace again locked itself in the wheel. Mr. Ritz reached behind and tried to unfasten the top, but could not. Defendant then put the reins on the dashboard, got down, and was pulling the wheels out while Ritz was pulling the top up, when, in his own words, "the thing came off with a snap." The horses at this moment went off with a bolt, seeing which Ritz jumped, and as a consequence of the runaway the team was killed and the buggy damaged.

The evidence of Ritz and that of defendant do not agree on certain points, which, however, cannot materially affect the issue. Whatever may have been the circumstances when the top locked on the previous occasions, it seems that its locking the last time when the horses trotted down the grade to go across a field to a better road, is explained by that part of Whybra's evidence where he says: "The top could be made to come down . . with unreasonable speed and on a rough road," or "turning a short corner," or "in a hole." If defendant is liable it must be of course on the ground of negligence, and if he was negligent it must have been in having

Digitized by Google

the reins loose on the dashboard when he got down to pull at the wheel. Although the leaving of horses in a street without being tied or held by the reins is not, in all circumstances, as a matter of law, necessarily negligence per se, it has been held that "the driver, however, in such cases ought to be near his horse and in a condition to control him by his voice and to reach him if necessary with his hand in an emergency:" Moulton v. Aldrich, 28 Kan. 300.

In Illidge v. Goodwin, 5 C. & P. 190, the owner was held liable although the damage was occasioned by the act of a passer-by in striking the horse. In McCahill v. Kipp, 2 E. D. Smith (N.Y.) 413, the Judge said: "It is not material what frightened the horse if he was not properly taken care of so as to prevent his running. It is the duty of the owner of a horse, in such circumstances, to exercise care on his part to guard against such an accident, and his neglect to do so involves him in liability for the consequences, as well as the person who may have caused the frightening of the horse." So, where the immediate cause of the running away was the falling of icicles, defendant was "not held responsible for the falling of the ice, but for his negligence in leaving his horse in a condition where he might run away if alarmed by such or any similar cause:" Bigelow v. Reid, 51 Me. 325.

It will be noticed that the above decisions, while shewing as to the main point what should be held to constitute negligence, also have a bearing on the question of contributory negligence, which was raised. To begin with, does not the evidence rather shew, especially in the light of Whybra's testimony, that the locking of the top between the wheels, at least on the last occasion, was due to trotting the horses down the grade in the dark? But, supposing that it was wholly due to a defect in the buggy,—how can this constitute contributory negligence? Probably it would not matter whether plaintiff knew or not of the defect. But the locking of the top, which at the most is all that plaintiff could be responsible for, played no part in frightening the horses. It did not make their running away any easier after they were frightened. It was, in short, neither the immediate nor the remote cause of their bolting. Defendant says that it was necessary that he should unlock the top to proceed on his journey, and that he could not do this and at the same time hold on to the reins. Possibly not alone. But Ritz was with him. It is not an answer to say that there was no duty from Ritz to plaintiff or to defendant. Ritz's conduct leads one to believe that he would have helped in anything that was

Digitized by Google

reasonable. Defendant could have at all events asked him, and, even if he was to be met with a refusal, it is just by shewing that he first exhausted all means which prudence might suggest that one can shew that he was not negligent in performing an act, rash in itself, on the ground that there was no other course open to him in the circumstances. Then, all this is on the assumption that the locking was mainly due to a defect in the buggy, while, as already stated, I think there is good ground to shew that the last locking, at least, was due to trotting the horses down a grade.

As to the value of the horses there is very wide divergence in the evidence. I will value them at $135 and $55, or $190 for the pair. The other damages, respecting which the evidence is somewhat uncertain, I assess at $12.

Judgment is for plaintiff for $202, plaintiff to have also his costs of the action.

---

## NORTH-WEST TERRITORIES.

### (EASTERN ASSINIBOIA.)

WETMORE, J. FEBRUARY 27TH, 1905.

CHAMBERS.

### RE HARDAKER.

*Limitation of Actions—Promissory Notes—Lien on Land—Right to Redeem—Tender—Sale—Confirmation—Costs.*

Motion for further directions.

E. L. Elwood, Moosomin, for Hardaker.

E. A. C. McLorg, Moosomin, for the Waterloo Manufacturing Company.

WETMORE, J.—The Court en banc held, in effect, that the company having made an effort to obtain information as to the amount necessary to redeem the property in question in this matter, and not being able to do so by reason of the default of Hardaker, and having tendered an amount only 87 cents short of what was payable to Hardaker, and being willing to pay the remainder, the Judge should not confirm the sale if the amount payable to Hardaker is paid as the Judge may direct; and also that sec. 42 of the Dominion Lands Act



Digitized by Google

does not apply to this matter. The Court referred the matter back to me with instructions to refuse to confirm the transfer unless it is made to appear to me that nothing is payable to the company now or in future under their lien, or that the lien quoad the land is barred by the Statute of Limitations, and, if these facts or either of them are found against the company, to confirm the sale, and if the sale is not so confirmed to make such order with respect to the sum of $100.87 payable to Hardaker for redemption as I may see fit. The Court en banc ordered that Hardaker pay the company's costs of the reference to that Court, and they left such costs as accrued or might accrue before me to my discretion.

The parties by their advocates appeared before me, and the only question that is really now remaining for decision is whether the company's lien quoad the land is barred by the Statute of Limitations. No question was raised as to an amount being due the company under this lien apart from that statute.

The statute in force affecting the question is the Imperial statute 37 & 38 Vict. ch. 57, which is made applicable to the Territories from the time of its enactment by sec. 2 of ch. 31 of the Consolidated Ordinances.

A certified copy of the lien of the company was produced in evidence before me, and it appears from that that the company sold to David Bishop and Isaac Goodwin, the registered owner of the land in question, a separator and a Pitt's 12 horse power mount. For this machine the purchasers gave three notes, the first for $200, due 1st January, 1891; the second for $200, with interest at 8 per cent., due 1st January, 1892; the third for $200, with interest at 8 per cent., due 1st January, 1893. And Goodwin created a lien or charge upon the land in question for the amount of these notes. It has been established also by evidence that the note first mentioned, which fell due on 1st January, 1891, has been paid in full by payments made by Goodwin on 11th February, 1891, on 17th January, 1893, 2nd November, 1893, and 8th January, 1894, respectively; leaving only the two last mentioned notes due and payable.

It is quite clear to me that the company's remedy both on the notes and to enforce their lien is not barred by the statute. Section 8 of the statute provides that "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within 12 years next

Digitized by Google

after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money or some interest thereon shall have been paid." I have recited all the provisions of the section necessary for the decision of the question raised.

In the first place, as I have stated, the first note secured by the lien has been paid, and it was paid during the periods I have stated, which prevented the statute operating to bar the right. As to the unpaid notes; one fell due in January, 1892, and the other in January, 1893. The summons in this matter was taken out on 23rd December, 1902, and a tender was made to Mr. Elwood, Hardaker's advocate, on 11th March, 1903. At the time the tender was made, therefore, 12 years, mentioned in the statute, had not expired; the company, therefore, at that time had the right to redeem the land. I may say that it was conceded all through that the tender made to Mr. Elwood, Hardaker's advocate, should be considered a sufficient tender as if made to Hardaker in person.

I must, therefore, refuse to confirm the sale, provided the company pays the $100.87 as I have hereinafter directed.

I will now deal with the question of costs. Hardaker's costs down to just before the hearing before me in Chambers on 13th March, 1903, have been taxed and are included in the $100.87 above mentioned. All the difficulty that has occurred since that time has been caused by Hardaker. In the first place, upon being approached by Mr. McLorg, he would not state truly the amount which he had paid for statute labour and for destroying noxious weeds on the property. That is, he did not state that fact truly if the affidavit which he filed with me on the 13th of that March is correct. In the next place, although Mr. McLorg, the advocate for the company, endeavoured to ascertain the amount that Hardaker claimed as payable to him, for the purpose of redeeming the land, Hardaker's advocate, acting no doubt under instructions from him, deliberately refused to give it, and it was only when the parties came before me on that date and Hardaker's affidavit was produced that the company's advocate was able accurately to ascertain what amount was claimed; and then it appeared that only 87 cents was due over and above the tender of $100 which Mr. McLorg had made. Mr. McLorg has urged, however, that even of this amount $6 was paid after the summons in this matter was taken out and served; I do not think that the evidence establishes that satisfactorily.

Digitized by Google

In the circumstances, Hardaker must pay the costs incurred in the proceedings before me at Chambers subsequent to the date of the tender, which was on 11th March, 1903. The counsel for the company has informed me, and I accept his statement, that the costs of the proceedings before the Court en banc ordered to be paid as before stated have been taxed, and that they are under $100, and that they have not been paid. The order will be that the costs of the company in the proceedings before me at Chambers subsequent to 11th March, 1903, be taxed on the lower scale by the clerk. That, of the $100.87 which I adjudge to be payable to Hardaker for the purpose of redeeming the land, a sufficient portion be applied to discharge the costs awarded to the company by the Court en banc, and taxed to the company. That the balance remaining of the $100.87 be applied in payment when taxed of the costs hereby awarded to the company for the proceedings in Chambers. And that the balance remaining, if any, be paid to Mr. Elwood, the advocate for Hardaker. If, however, after the costs above mentioned are satisfied, there should be a balance coming to the company, the company to have execution therefor against Hardaker. The confirmation of the sale will be refused. And I also order that the caveat lodged by Hardaker in the office of the registrar of land titles against the property in question be set aside and discharged. And I also order that the material used before me on this application be filed with the clerk of the Court for this judicial district.

---

## NORTH-WEST TERRITORIES.

### (EASTERN ASSINIBOIA.)

WETMORE, J. FEBRUARY 28TH, 1905.

CHAMBERS.

### DODDS v. MORRISON.

*Building Contract—Action for Balance of Contract Price—Counterclaim—Omission to do Part of Work—Failure to Complete in Workmanlike Manner—Questions of Fact—Costs—Set-off—Scale of Costs.*

Action to recover the balance due under a contract for the building of a house by plaintiff for defendant, and

Digitized by Google

counterclaim for damages in respect of the quality of the work, etc.

.W H. Williams, Carlyle, for plaintiff.

A. M. Matheson, Arcola, for defendant.

WETMORE, J.—Plaintiff and defendant entered into an oral agreement whereby plaintiff agreed to build a house for defendant. The exact terms of this agreement are not very distinctly proved, but on 25th May, 1904, the parties entered into a written agreement, by which, although the character of the work to be performed by plaintiff was not fully described, the terms of payment were settled, and it was agreed, among other things, that plaintiff was to complete the building in a good and workmanlike manner. It does not appear under the original oral contract that there was any special provision that the work was to be done in a workmanlike manner, but that is implied in every such agreement, unless there is a provision to the contrary.

It was urged on the part of plaintiff that the agreement of 25th May was in settlement of disputes between the parties as to the character of the work, and was tantamount to an acquiescence by defendant in the character of all work done previous to this date. I do not look upon the memorandum as having that effect in itself, and there is no evidence that points in the direction that it was intended to have that effect. It seems that the character and the nature of it were more to fix the payments that were to be made in respect to the work and the nature of it, especially in view of the fact that there had been alterations in the work, differing from what was originally intended, as, for instance, the house instead of being simply sheeted and sided with lumber, as was originally intended, was changed to brick veneer.

This action is brought to recover the last instalment of the price for the work, $300, as fixed by this memorandum of 25th May.

The defence set up is, that the work was not done in a good workmanlike manner, and that some of the work agreed to be done was not done at all. I have come to the conclusion that the painting and plastering is not all done in a good workmanlike manner. It was urged also at the trial that some of the carpentering work and the work on the foundation were not done in a workmanlike manner, and that some of the grouting, which defendant alleges was agreed to be done, was not done at all. As to the grouting, I find that there was no agreement to do that work. I have not reference to the grouting of the windows, as provided in the memorandum

Digitized by Google

of 25th May; the grouting in question is a different grouting altogether.

Defendant counterclaimed for damages in respect to the omission to do this work, and also for the omission to do the other work in a good and workmanlike manner. In his defence defendant alleges in a general way that the house was to be grouted, and that that grouting had not been done. In his counterclaim he alleges that the grouting agreed to be done was to grout behind the brick, or, in other words, between the brick-veneering and the sheeting; and I should judge, therefore, that that was the particular grouting which defendant's advocate had in mind when he drew defendant's pleading. In his evidence, however, defendant states that this grouting was to be done on the inside of the house. He says that "the inside was to be grouted, a tier of half-inch to go on, and then grouted." This arrangement was made at the time the original agreement was entered into. I must say that I cannot understand what he means by inside grouting. At any rate it must have been some grouting placed inside the sheeting, and I have come to the conclusion, in all the circumstances, that there was no agreement to do this grouting. Plaintiff denies it, and when the memorandum of 25th May was entered into, the plastering of the inside of the principal part of the building had so far progressed that it would be impossible to do this grouting unless the plastering was torn down; no reference is made to that in the agreement of 25th May, and, if there was an agreement to grout, I cannot understand defendant entering into that agreement without making any reference to such grouting, seeing, as I have before stated, that that grouting could not be done unless the plastering was torn down. These circumstances, in view of the difference between what was alleged in defendant's pleading and what he swore to, lead me to the conclusion that plaintiff is correct, and that there was no agreement to do such grouting, and I so find.

As to the foundation not being done in a workmanlike manner; the complaint is that the pointing was not done in black, and also, I should add, that the foundation for a verandah was not made. The evidence does not satisfy me that the pointing was to be done in black, nor does the evidence satisfy me that there was any agreement to build a foundation for the verandah. Plaintiff denies that there was an agreement to build a verandah or a foundation for it, and defendant's evidence is that plaintiff was to build a verandah and a foundation for it. Now, he did not build the verandah, somebody else did, and the omission to build the verandah itself is

Digitized by Google

not one of the complaints which defendant raises in this case, and, if the agreement had been as he states it, I cannot see why that complaint was not raised, seeing that he got the verandah built by some person else. I have come to the conclusion, therefore, that plaintiff did not agree to build this verandah, and if he did not agree to build the verandah he did not agree to build the foundation for it.

I think some of the pointing of the foundation, however, which he did build, was not done in a workmanlike manner; it was so inefficiently done that it was washed away, and defendant is entitled to be allowed for what he had to pay in making that good, which was $3.25.

It was also urged that plaintiff was guilty of an omission in not putting in some wainscotting in the kitchen and chair-boards in the dining-room. There was no special provision in any agreement between the parties to do this work. Defendant contended, however, that it is ordinary work in building a house, and would naturally be included without any special provision. I, under the evidence, have arrived at a different conclusion, and find that such work, unless specially provided for, would be an extra, and, therefore, that plaintiff was not bound to do that work. There was some evidence also given as to defective work in the carpentering generally. The defective work in this respect was entirely dependent upon the testimony of one Mills, a witness called for defendant. I have come to the conclusion that the carpentering work was reasonably well done, and so find. The testimony on behalf of plaintiff is to that effect, and I find in the statement of defence there is no specific allegation as to the carpentering work not being properly done, and the only reference in the counterclaim as to defective carpentering work is the carpentering work around the chimney and the wainscotting in the kitchen, and the chair-board in the dining-room. Defendant in his own testimony has no complaint to make with respect to the carpentering work, other than the wainscotting and the chair-boards, which I have already dealt with. The testimony of the witness Mills did not appeal to me very strongly. The only defective work, therefore, which I find in respect to plaintiff's work is in the plastering and the painting and the pointing of the foundation, which I have before referred to. The defective plastering is quite clear; it is abundantly established by the testimony of Buchanan, plaintiff's own witness. I have no doubt that this defective plastering was largely due to the work being done in frosty weather, without the building being properly heated, and it affords no answer that the work was done at defend-

Digitized by Google

ant's instance or request; that is, that the work was changed from ordinary plaster to hard finish, because the work could have been properly done if the building had been properly heated. It was not the duty of defendant to do the heating; it was entirely the duty of plaintiff or his employee Buchanan. Plaintiff testifies that, in his opinion, it was Buchanan's duty. That does not affect the question raised in this case, and plaintiff must be responsible for the omission of his employee, if it was his omission.

As to the painting, I am quite satisfied under the testimony of the witness Cowan that the painting was very indifferently done; the wood work was not properly sandpapered as it ought to have been, and made smooth; proper filling was not used; a large quantity of painting was done over dust and sand which had gathered on the woodwork; the painting of the windows was streaked, and the nail-holes had not been properly puttied before painting; and I also find that the work was so indifferently done that in order to make it proper the whole thing would have to be taken off and the painting done over again. In Clark v. Lee (Book No. 24, p. 123), decided by me on 26th April, 1893, I held that "where work under a building contract was performed in an unworkmanlike manner, the party for whom the work was done was entitled to have deducted from the contract price what it would cost to do the work so as to make it as it ought to have been done." I apply what I so held in that case to this case. The evidence establishes that to remedy the defective plastering would cost $72; to remedy the defective painting would cost $125; and, as already stated, defendant paid $3.25 to remedy the defective pointing. This in the whole would amount to $200.25. Now, the amount of the contract price unpaid, and to recover which this action is brought, is $300. Plaintiff is not entitled to interest under the evidence. Deducting, therefore, from this $300 the $200.25 above specified, there is a balance of $99.75 in favour of plaintiff.

Plaintiff also claimed $13.50 for ten bags of hard wall finish which he alleges in his statement of claim were retained by defendant. The evidence entirely failed to establish any conversion to his own use by defendant of this property. There is no evidence to establish that he used it: the only evidence is that it was left at defendant's house when the work was done; there is no evidence that plaintiff ever made any demand for it; plaintiff therefore cannot recover for the hard wall finish.

There will therefore be judgment for plaintiff for $99.75 with costs.

Digitized by Google

Defendant is not entitled to recover anything by virtue of his counterclaim because he has got all the relief he is entitled to under his statement of defence by the judgment as above stated. If there had been a balance coming to defendant after making these deductions, he would have been entitled to recover the amount on the counterclaim; but at the same time I am of opinion that it was prudent for defendant to plead that counterclaim in the circumstances, and therefore, while I dismiss the counterclaim, I will not allow any costs of it to either party.

There will be, therefore, judgment for plaintiff on the statement of claim for $99.75 and costs, as stated; and the counterclaim will be dismissed without costs. Plaintiff has recovered less than $100, and his action possibly might strictly speaking have been brought under the "small debt procedure." I however do not express any decided opinion on that question, because I am of opinion that, if he could have brought his action under the "small debt procedure," the character of this action is such that he was justified in bringing it under the ordinary practice of the Court; and I will therefore direct that his costs be taxed on the lower scale applicable to such actions, but, inasmuch as he brought his action on the higher scale, the clerk will proceed as provided for in item 95 of the tariff.

---

## NORTH-WEST TERRITORIES.

### (EASTERN ASSINIBOIA.)

WETMORE, J. MARCH 1ST, 1905.

CHAMBERS.

### McNAUGHTON CO. v. HAMEL.

*Interpleader—Sheriff—Seizure of Goods—Claim of Third Party under Chattel Mortgages and for Rent—Withdrawal by Seizure as to Property Covered by Mortgages—Costs —Issue as to Claim for Rent.*

An interpleader application by a sheriff.

E. A. C. McLorg, Moosomin, for sheriff.

E. L. Elwood, Moosomin, for attaching creditors.

J. T. Brown, Moosomin, for claimant.

Digitized by Google

WETMORE, J.—This is an interpleader matter. The sheriff, under an attachment issued by plaintiff against defendant Jacob Hamel, seized a quantity of cattle, wheat, and other property. Conrad Hamel claims an interest in the property seized, as to a portion of it under certain chattel mortgages, and as to another portion of it for rent. The claimant filed an affidavit setting forth the nature of his claim, and was, under an order made by me for the purpose, cross-examined upon such affidavit.

The first mortgage is dated 13th December, 1902, and is for $600; the second mortgage is dated 16th February, 1904, and is for $1,708. The consideration for the second mortgage appears to have been made up of the whole principal of the first mortgage and some unpaid interest, and an indebtedness due on a note, and $1,000 advanced.

It was contended in the argument on 23rd December that the consideration for the second mortgage was not truly set out. It is stated to be for an accrued indebtedness, whereas the cross-examination discloses that part of the consideration was the amount secured by the first chattel mortgage, upon which $300, a portion of the amount secured by that mortgage, had not matured. I am relieved from deciding this question. I may say, however, that I am strongly inclined to the opinion that the second mortgage is not invalidated by reason of the objections set up for the attaching creditors. But it was made to appear to me that, after this argument, the attaching creditors' advocate instructed the sheriff to withdraw from the property covered by these chattel mortgages; and the sheriff has withdrawn accordingly. It was urged, however, that this withdrawal was for the purpose of saving expenses, and that, with a view to costs, I must decide the question raised as to the validity of the mortgage. I decline to do so. The interpleader proceedings are instituted for the benefit and protection of the sheriff, and the attaching creditors, having instructed the sheriff to withdraw from the seizure of the property mentioned in the mortgages, have abandoned that part of the sheriff's seizure, and have in effect stated that they do not wish to take any benefit from it. That being so, I consider myself relieved from the duty of deciding as to the right of property; the attaching creditors have concluded that question, in my opinion. I may add, however, that I am not much impressed with the reasons advanced for withdrawing, because, in view of the fact that I had made an order for the sale of all the property that was liable to lead to great expense by way of possession money, I am not just able to see why the attaching creditors

Digitized by Google

should in their instructions to the sheriff to withdraw have been influenced by the question of the expenses.

The only question, therefore, remaining for decision in this matter is the right of the claimant to the rent he claims. It was urged on behalf of the attaching creditors that the claimant's cross-examination discloses that the second mortgage, for $1,708, was taken in full satisfaction of all moneys due to the claimant at that time, with the exception of a note for $371. In my opinion, the evidence does not disclose that, or it does not do so satisfactorily, and, to say the least, I am of opinion that the claimant is entitled to an issue in respect to his rights in so far as the rent is concerned. Before making any order, however, I will leave the matter opon to enable the attaching creditors' advocate to state whether he desires an issue, or to enable him to take any step as to any other course which he may reasonably ask me to order in view of this judgment.

---

## YUKON TERRITORY.

DUGAS, J. FEBRUARY 20TH, 1905.

CHAMBERS.

### BARRETTE v. CANADIAN BANK OF COMMERCE.

*Pleading—Motion to Strike out Part of Defence and Whole of Counterclaim — Embarrassment — Previous Action — Res Judicata.*

Action for an account against the bank and the Syndicat Lyonnais du Klondike. Motion by plaintiff to strike out paragraphs 9, 10, 11, and 12 of the statement of defence of defendant syndicate, and the counterclaim based upon these paragraphs, as being an abuse of the process of the Court, inasmuch as they raised the same issue which was determined between plaintiff and the syndicate on the counterclaim of the latter in the action of Canadian Bank of Commerce v. Barrette and the syndicate. In that case the Territorial Court in banc gave judgment in favour of Barrette, but an appeal to the Supreme Court of Canada had been taken and was pending.

J. B. Pattullo, for plaintiff.

F. J. Stackpoole, for defendant bank.

H. Bleecker, for defendant syndicate.

Digitized by Google

DUGAS, J., referred to the Digest of English Case Law, vol. 6, p. 367, and to Hunter v. Stewart, 4 De G. F. & J. 168, as to the doctrines of estoppel and res judicata, and proceeded:—

There is no doubt whatsoever that the same issue is raised upon which the Syndicat Lyonnais du Klondike recovered damages to the amount of $40,500 against the plaintiff, which judgment was reversed, it is true, by the Territorial Court in banc, but from which judgment there is an appeal now pending before the Supreme Court of Canada. The final judgment in the case will completely settle the issue between the parties as to the alleged deceit or fraud; and this part of the defence and counterclaim in the present case offers no other issue, and the same evidence would have to be gone over again to support those pleadings.

This is embarrassing and really an abuse of the process of the Court, though the syndicate is entitled to be protected and have their rights, if any, recognized and maintained in this present suit according to the final adjudication in the other case.

Should there be in this present case a judgment against the syndicate in favour of plaintiff, the former would have the right to set off the amount found to be due them in the first case, and for that purpose an application to stay proceedings and set off at a proper time would be favourably entertained.

Some authorities have been cited under the English Rules, from which our Rules are copied, others from the Ontario Rules, which are more extensive, inasmuch as 296, 297, and 298 specially permit striking out of part of a plea and only for the same reasons for which the entire pleadings may be struck out.

I do not find in the English Rules, or in ours, any such special enactment. Our Rule 126 is not as broad as those of Ontario on the point. Under Rule 150 the counterclaim can be struck out, and under Rule 126, and what has always been held as to the inherent jurisdiction of the Court, the right exists to strike out the proceedings or part of the proceedings proven on affidavits to be either vexatious or frivolous or to be an abuse of the process of the Court or embarrassing.

The paragraphs in question and the counterclaim founded thereon are of that nature.

They are therefore struck out, with costs in any event.

Digitized by Google

THE

# Western Law Reporter

VOL. I. TORONTO, APRIL 1, 1905. No. 5.

## YUKON TERRITORY.

DUGAS, J. FEBRUARY 20TH, 1905.

CHAMBERS.

### CANADIAN BANK OF COMMERCE v. BUTLER.

*Parties—Application to Add Defendants—Indorsers of Promissory Notes Sued on—Allegation of Payment—Opposition of Plaintiff—Third Party Procedure.*

Motion by defendant to have two persons added as co-defendants, upon the ground that they were indorsers of the promissory notes sued upon, and that they had paid plaintiff the amounts of the notes, in discharge of all the parties to the notes, etc.

DUGAS, J.—Our Rule 34, under which this application is made, is exactly similar to the English Rule 133, and I find that it is considered in England that this Rule was not intended to apply where the parties sought to be made defendants were persons against whom plaintiff did not desire to prosecute any claim, and whom defendant wished to add only for his own convenience.

This Rule must be applied strictly, otherwise it may be used in a way exceedingly harassing to plaintiffs. . . .

At the argument I mentioned that I thought that this was a case for third party proceedings, and, although the Court might perhaps have power to grant the application, yet I think that, in view of the opposition of plaintiffs, and that the application is made by defendant, it is better that the latter should be made to adopt third party proceedings; all applications for additional third parties reserved.

The motion is therefore dismissed, but without costs.



Digitized by Google

## YUKON TERRITORY.

DUGAS, J. FEBRUARY 20TH, 1905.

TRIAL.

### HOWE v. SCHROEDER.

*Stolen Goods—Exchange—Owner Following Proceeds—Execution Creditor—Interpleader.*

Interpleader issue. A horse was seized under an execution issued upon a judgment obtained by Schroeder against one Woodworth, and claimed by Howe as his own.

R. L. Ashbaugh, for claimant, plaintiff in the issue.

A. G. Smith, for execution creditor, defendant in the issue.

DUGAS, J.—The claimant, Howe, was proprietor of a mule which one Woodworth took up to Hunker creek, and, without any authority, exchanged and bartered for a horse belonging to a Japanese, called Y. Okada. On reaching Dawson, Woodworth went to see Howe, and told him that he had left his mule on the creek, as it had been wounded and was lame, but, evidently admitting that he had some responsibility towards Howe, he gave him as security the horse in question, with the understanding that he, Woodworth, could redeem it for $100 within 20 days. Woodworth remained in possession, and, in the meantime, the horse was seized by the execution creditor, Schroeder.

In the interval, Howe had found that the representations made by Woodworth were false, and that in fact he had bartered his mule for the horse. For this Woodworth was criminally convicted.

Woodworth could not surely claim the ownership of the horse, either against Okada or Howe. Schroeder, as his execution creditor, cannot claim any more right in the horse than himself against either of them.

In Rex v. Justices, 16 Cox 143, 196, it was held, under a provision similar to sec. 833 of the Canadian Criminal Code, that the Court can order the restitution of the proceeds of the goods, as well as the goods themselves, if such proceeds are in the hands of the criminal or of the agent who holds for him.

Digitized by Google

The horse here is the proceeds of the stolen mule, and against Schroeder, Howe is entitled to the same. After the seizure, Okada gave him a title to the horse, but this is not the point at issue.

Taking into consideration all the circumstances of the case, I declare the horse to be the property of Howe as against Schroeder, and his claim thereto is maintained with costs of this interpleader against Schroeder and all costs incident.

---

## MANITOBA.

MARCH 4TH, 1905.

FULL COURT.

### GOURMANY v. MANITOBA CLUB.

*Master and Servant—Dismissal of Servant—Justification.*

County Court appeal. Plaintiff was employed as chef at the Manitoba Club at $125 a month. On 14th September, 1904, he gave notice that he would resign at the end of the month, but on 20th September he was summarily dismissed, having been charged with appropriating wines and food with which he gave little parties on his own account. He then brought this action to recover $183.25 for wages and damages for wrongful dismissal, and secured a verdict in the County Court for the amount claimed. Defendants appealed.

F. H. Phippen and A. C. Ewart, for defendants.

R. A. Bonnar, for plaintiff.

THE COURT allowed the appeal with costs, reversing the judgment in the Court below, and entered judgment for defendants, holding that the dismissal was justified, as the evidence shewed that plaintiff had taken articles and utensils for his own use, and accepted presents of game and other things from tradesmen dealing with the club, from whom he ordered goods for the use of the club.

Digitized by Google

## MANITOBA.

MARCH 4TH, 1905.

FULL COURT.

## CURLE v. CITY OF BRANDON.

*Way — Non-repair — Municipal Corporation — Liability for Death Arising from Defective Approach to Bridge—Notice of Claim—Time within which to be Given—Form of Notice —Signature by Solicitor.*

Appeal from decision of RICHARDS, J., 24 C. L. T. Occ. N. 279.

On 4th September, 1903, at the time of the Brandon fair, William Curle and another man attempted to cross a bridge over the Assiniboine from Brandon to the north side of the river, with a traction engine, which weighed about nine tons. The engine passed over the approach till the front wheels reached the end of the main bridge, when the spans of the approach broke under the weight of the moving engine, which fell to the ground, carrying with it Curle and his companion, and they were both instantly killed.

The city of Brandon purchased the bridge in 1886 and rebuilt it in 1897. After the accident it was found that one of the joists put in in 1898 had rotted nearly through before the accident and had been greatly weakened thereby. The rot was the result of water lodging in an old spike hole in the joist.

The action was tried at the March assizes in 1904 before RICHARDS, J., who subsequently gave judgment in favour of Mrs. Curle, the administratrix of her husband's estate, for $2,300, being $2,000 for herself and $300 for a grandson, who lived with the deceased William Curle and was being brought up as one of his family, he being of the age to require some schooling and maintenance.

Defendants appealed, on the grounds: that there was no negligence on their part in connection with the accident, maintaining that Curle was guilty of contributory negligence by attempting to cross the bridge with such a heavy load without having first thoroughly planked the bridge, as had been done in other cases; that the taking of traction engines along the public highway was not such "ordinary traffic" as

Digitized by Google

was contemplated by the Municipal Act and for which defendants were bound to keep their roads and bridges in such repair as to accommodate; and that all care had been taken to avoid accident, and the bridge had been periodically inspected and repaired.

H. M. Howell, K.C., and I. Campbell, K.C., for defendants.

C. P. Wilson and J. F. Kilgour, for plaintiff.

THE COURT affirmed the judgment of RICHARDS, J., and dismissed defendants' appeal with costs.

---

## MANITOBA.

MARCH 4TH, 1905.

FULL COURT.

### FERRIS v. CANADIAN NORTHERN R. W. CO.

*Railway — Carriage of Goods — Liability for Deficiency in Grain—Weight or Measurement—Negligence—Carriers or Warehousemen—Rights of Consignor—Bill of Lading—Indorsement to Consignee—Manitoba Grain Act—Certificate of Weighmaster—Evidence — Rebuttal — Weights and Measures Act—Ascertainment of Quantity.*

Plaintiff sued to recover the value of a quantity of wheat which he alleged was shipped by him over defendants' railway, and was not accounted for. In September, 1902, plaintiff loaded a car with wheat at Oakland station to be shipped to Port Arthur. The car was a new one, in good condition; its nominal capacity was given as 60,000 pounds, but its actual capacity was in excess of that amount. When carrying wheat its nominal load would be 1,000 bushels, but it was alleged that it was customary to ship more than that quantity in such a car. Plaintiff loaded the car and the agent sealed it and billed it to Port Arthur. Plaintiff alleged that there were 1,334 bushels of wheat in the car, but that defendants only accounted to him for 800 bushels and 10 pounds.

For the defence a number of witnesses were called to prove that the car arrived safely in Port Arthur, and that nothing remarkable was noticed in connection with it, either

Digitized by Google

en route or after its arrival. It was weighed by government officials and tested, and it was asserted that the car could not hold 1,334 bushels, as contended by plaintiff.

The case was tried at the assizes in Portage la Prairie before PERDUE, J., who subsequently gave judgment for plaintiff for $275 with costs of suit.

Defendants appealed.

The judgment of the Court was delivered by

DUBUC, C.J.—The trial Judge found that at least 1,270 bushels of wheat were placed by plaintiff on board a car of defendants at Oakland Station, to be shipped to Port Arthur. The evidence as to the quantity is positive and clear. That quantity was shewn by the number of bags, each containing at least two bushels, carried to the station and put into the car; that number corresponded in substance with the number of bags filled up at the thresher, and hauled from there to the station; there was a man at the car who received the wheat and counted the bags. That quantity was also established, approximately at least, but not less certainly, by the height of the wheat in the car, being notably above the grain door mark, which shewed the nominal capacity of the car to be 60,000 pounds or 1,000 bushels, witnesses having shewn that there was a board nailed above the door to permit a larger quantity of wheat to be put into the car; this was shewn to be done in many cases where cars are loaded with 1,300 bushels or more. On the other hand, defendants had the car examined and sealed at Oakland; it was also examined at Winnipeg and at Port Arthur. Nothing unusual was found; no sign of leakage or that any part of the wheat had been removed from the car. At Port Arthur the car was emptied into the elevator and the wheat weighed; and the car load was found to contain only 800 bushels and 10 pounds. The weighing is done under the supervision and control of a weighmaster employed by defendants and another appointed by the Dominion Government. No one can doubt the accuracy of the figures given by those men as to the quantity of wheat contained in the car stated to them to be the car in question. The discrepancy was not accounted for. We are then confronted with the fact that plaintiff delivered to defendants a certain quantity of wheat for transportation to Port Arthur, and with the further fact that a much smaller quantity was delivered at the point of destination. The trial Judge held that defendants were liable for the deficiency. It

Digitized by Google

seems to me that his decision is supported by the authorities, as his findings of fact are borne out by the evidence.

The defendants contend that, by the 4th condition of the contract indorsed on the bill of lading, they should not be held responsible for any deficiency, by weight or measurement. But, by sec. 246, sub-sec. 3, of the Railway Act, 51 Vict. ch. 29 (D.), they cannot claim to be exempt from damages arising from any negligence or omission from themselves or their servants. That point has been considered by the courts in many cases, and the trend of authorities seems to be against the contention of defendants: Hall v. Grand Trunk R. W. Co., 34 U. C. R. 517; Fitzgerald v. Grand Trunk R. W. Co., 39 U. C. R. 526; Vogel v. Grand Trunk R. W. Co., 11 S. C. R. 612; Macmillan v. Grand Trunk R. W. Co., 16 S. C. R. 543; Czech v. General Steam Navigation Co., 17 L. T. 246; Martin v. Great Indian Peninsular R. W. Co., L. R. 3 Ex. 9; Curran v. Midland Great Western R. W. Co., [1896] 2 Ir. R. Q. B. 183.

Defendants contend that their liability as carriers ceased as soon as the car in question arrived at Port Arthur; they then became warehousemen, and as such they are only bound to use ordinary care. In Mitchell v. Lancashire and Yorkshire R. W. Co., L. R. 10 Q. B. 256, defendants having carried some flax to its destination notified plaintiff to remove it, stating they would hold it "not as common carriers but as warehousemen, at the owner's risk and subject to the usual warehouse charges." Plaintiff removed some of the flax, but left the rest at the station for more than two months. The flax became damaged by wet. In an action for damages it was admitted that if defendants were bound to take reasonable care of the flax they had not done so. It was held that, treating the advice note acquiesced in by plaintiff as a contract, the terms of it, taken altogether, did not exempt defendants from liability for negligence to the extent that they would be liable as warehousemen or bailees for hire; and that they were therefore liable for the damage.

In the present case, the finding of the trial Judge is to the effect that the deficiency occurred through the negligence or omission of defendants, and, in such circumstances, they must be held liable, either as carriers or warehousemen.

The contention of the defendants that plaintiff, having indorsed the bill of lading, had no more interest in the wheat, and was not entitled to bring this action, is not maintainable.

Digitized by Google

By indorsement of the bill of lading the property in the goods passes to the consignee, but the consignor himself remains always liable for the freight, unless there is a special agreement by which he is to be discharged from such liability. He is one of the contracting parties for the carriage of the goods, and has such an interest in them as to entitle him to bring an action for damages for the loss of them. The carriers cannot set up, as a defence, that the title to the goods is in a third party: Leggett on Bills of Lading, p. 626; Brill v. Grand Trunk R. W. Co., 20 C. P. 440; Great Western R. W. Co. v. Bagge, 15 Q. B. D. 625.

As to the value of the wheat, plaintiff has shewn that it was worth 60 cents a bushel at Oakland. Defendants have not shewn that it was worth less than that there, or less than that and the freight added at Port Arthur.

It was submitted that by the Manitoba Grain Act, 63 & 64 Vict. ch. 39, secs. 8, 9, 10, the certificate of the weighmaster should be considered conclusive as to the quantity of grain in the car weighed at Port Arthur. But sec. 9 says that such certificate shall be, in all cases, prima facie evidence of the facts therein contained.

That prima facie evidence has, in this case, been rebutted by positive evidence given on behalf of plaintiff.

Defendants raised the point that the quantity of wheat to be carried was not ascertained as required by the Weights and Measures Act, R. S. C. ch. 104, sec. 21, and that, therefore, plaintiff cannot recover. The contract, as evidenced by the shipping bill, was not for a quantity to be ascertained by weight or measure different from those provided for by the said Act; and it cannot be held void on that account. It was for carrying wheat in bulk, the bulk being a car load, which was nominally stated to be 60,000 pounds.

The quantity accounted for by the defendants was 800 bushels and 10 pounds; the plaintiff has conclusively proven that the quantity placed on board the car and forming the car load was 1,270 bushels. It is a question of difference in quantity and not a question of a particular contract required to be in accordance with the provisions of the Weights and Measures Act, and, in my opinion, the Act does not apply to the particular circumstances of this case.

I think the judgment should be affirmed and the appeal dismissed with costs.

Digitized by Google

## MANITOBA.

PERDUE, J. MARCH 13TH, 1905.

CHAMBERS.

## WALKER v. ROBINSON.

*Judgment—Order for—Powers of Referee—Rescinding Order —Appeal—Setting aside Judgment—Costs.*

Action by a brother and sister against their father to compel the administration of the estate of defendant's deceased wife.

A defence was put in, and notice of trial given. Then a præcipe order was obtained changing the solicitor for plaintiff Walker to Huggard, and another changing the solicitor for plaintiff Robinson to Haney. These were served on defendant's solicitor, but not on Elliott, the solicitor on the record for plaintiffs.

After the change of solicitors, Haney obtained from the Referee an order (dated 11th November, 1904) on consent dismissing the action without costs, and judgment was signed pursuant thereto.

These steps were taken pursuant to a settlement which had been arrived at with defendant, by the terms of which he was to furnish the money to pay Elliott's costs.

An application was then made by plaintiff Walker and by Elliott, solicitor for plaintiffs, to the Referee for an order setting aside the order for judgment and the judgment entered thereon, and for an order that defendant and Haney be directed to pay to Elliott his costs of the action as between solicitor and client, including the costs of the motion.

The Referee dismissed the application.

Plaintiffs and Elliott appealed to a Judge in Chambers.

G. A. Elliott, for plaintiff Walker, and for himself as solicitor.

H. A. Robson, for Haney.

J. R. Haney, for plaintiff Robinson.

D. W. McKerchar, for defendant.

Digitized by Google

PERDUE, J.:—The main grounds for making the application, as appearing in the material filed, were that defendant had, with the aid of Haney, made a settlement of the suit with plaintiffs, without the knowledge of their solicitor, Mr. Elliott, and that an alleged understanding between plaintiff Walker and defendant, as to the payment of Mr. Elliott's costs, had not been carried out.

If the only grounds urged before me had been those taken before the Referee, I would have dismissed the appeal.

A new point was, however, argued before me which had not been taken before the Referee.

The order of 11th November, sought to be set aside, is not an order dismissing the action, although mentioned as such in the Referee's judgment, and apparently treated as such on the argument before him. It is an order purporting to be made on the consent of both plaintiffs and defendant, directing that judgment be entered and signed in the action in favour of defendant without costs. Strangely enough, the judgment which was entered in pursuance of this order, recites the order as one dismissing the action, and then orders and adjudges that the action be dismissed without costs.

It is contended by the appellants that the Referee had no jurisdiction to make the order of 11th November, and that the judgment is bad, inasmuch as there is no order dismissing the action.

At the time the order was made the cause was at issue, had been entered for trial, and was on the list of causes for trial.

It was urged by counsel opposing the appeal that under Rule 449 a Judge sitting in Chambers may exercise the same power and jurisdiction as is exercised by the Court; that under Rules 27 and 29 the Referee may exercise all the jurisdiction of a Judge in Chambers, saving only the exceptions mentioned in Rule 27; and that the present case does not fall within these exceptions.

Rule 449 is taken from the old Equity Orders (see Taylor's Con. Orders, Order No. 210), and is primarily derived from the Imperial statute 15 & 16 Vict. ch. 80, sec. 13. That Act abolished the office of Master in Ordinary and created the jurisdiction of an equity Judge sitting in Chambers.

The Act defined the business that might be transacted in Chambers, and the above section was passed to give the same

Digitized by Google

validity to an order made in Chambers as it would have had if made in Court before the passing of the Act.

Rule 449 does not therefore mean, that a Judge may exercise in Chambers every function of the Court, but that he has power to perform any business which may be transacted by him as a Judge in Chambers under the provisions of the Act, with the same binding effect as if it had been done by the Court. Section 39 of the English Judicature Act is very similar to our Rule 449, and it has been held that that section does not enable a Judge to do anything in Chambers which he could not have done in Chambers before the passing of the Act: Baker v. Oakes, 2 Q. B. D. 176.

The Referee has, no doubt, power to dismiss an action by the consent of the parties.

That would be a matter relating to the conduct of the action and is covered by Rule 442 (d).

Entering a judgment for defendant is an adjudication and final disposition of the cause of action involved, and is widely different from a mere dismissal of the action.

When the action has been entered for trial, such a judgment should be pronounced by a Judge sitting in Court.

I therefore am of opinion that the Referee had no power, even by consent, to make the order of 11th November. The question then arises: had the Referee on the motion made before him power to rescind his own order. The order was not made ex parte. An order, other than one made ex parte, cannot when once issued be rescinded by the Judge who made it: Re Nazare, 12 Ch. D. 88; Preston v. Alsopp, [1895] 1 Ch. 141.

If the Referee could not rescind his order, I cannot, on this appeal from him, do so.

There is no appeal before me from the order of 11th November. It is only the order of the Referee refusing to interfere that has been appealed.

The motion before the Referee did, however, ask that the judgment in the action be set aside. This was a motion which the Referee might entertain. If it had been called to his attention that the judgment did not follow the order and that it in fact was unauthorized and unsupported by any order or pronouncement of the Court, he might have set it aside. In the circumstances, I think this should have been done.

Digitized by Google

On the argument, Mr. Elliott on behalf of himself and the plaintiff Walker made the offer that if his costs, to be taxed as between solicitor and client, were paid by defendant, and if the order of 11th November were varied so that it should merely provide for a dismissal of the action, the judgment might be allowed to stand. If defendant is willing to accept this offer, an order may be made in the terms of it.

As he is absent from Manitoba, I will give him up to the 27th of this month in which to signify his assent or otherwise.

If this offer is declined, I will then make an order setting aside the judgment.

As the appellants have failed on all the grounds taken before the Referee, I allow no costs.

---

## BRITISH COLUMBIA.

### (NELSON.)

MORRISON, J. FEBRUARY 11TH, 1905.

TRIAL.

### YOUNG v. WEST KOOTENAY SHINGLE CO.

*Wages—Independent Contractor — Logging Contract — Payment to Contractor without Production of Signed Pay Rolls —Mechanics' Lien Act.*

Plaintiff and a large number of other wage-earners were employed by one Farnell to get out logs from defendants' timber limits, and deliver them at defendants' saw mill. Farnell had a contract with defendants for the furnishing of the logs, and was largely in their debt for advances made to enable him to carry on his contract. Part of this debt was secured by chattel mortgage on Farnell's plant. The contract had been carried on for about a year, when defendants entered into possession under their chattel mortgage, which caused all work under the contract to cease. At that time the wages sued for in this action had been earned and were unpaid. The claims for wages were accordingly all assigned to plaintiff, who brought this action to recover the aggregate amount. Plaintiff alleged that defendants were the real

Digitized by Google

debtors, and that in any case they were liable under secs. 26 and 27 of the Mechanics' Lien Act, R. S. B. C. ch. 132.

R. M. Macdonald and R. W. Hannington, for plaintiff.

W. A. Macdonald, K.C., and A. M. Johnston, for defendants.

MORRISON, J.—This action is brought by plaintiff as assignee of a number of claims for wages earned while the men to whom the wages are due were working for one Farnell. At the trial plaintiff sought to establish the fact that the men were in reality employees of defendants, and that Farnell in hiring the men was merely acting as the agent or foreman of defendants. In the alternative plaintiff contends that the agreement between defendant and Farnell was colourable, and a mere scheme or device, between Farnell and defendants, to evade liability on the part of defendants, for the men's wages, I am of the opinion that the agreement in question was bona fide, and that Farnell was not the agent of defendants, but was acting as an independent contractor.

Plaintiff further contends, in the alternative, that defendants should pay the wages under secs. 26 and 27 of the Mechanics' Lien Act. Section 26 of the Act provides that every person making or entering into any contract, &c., with any other person for the purpose of furnishing logs, by which it is necessary to engage and employ workmen, shall, before making any payment for or on behalf of or under such contract, require such person to whom payment is to be made, to produce and furnish a pay roll or sheet of the wages and amount due and owing and of the payment thereof, or if not paid, the amount of wages or pay due and owing to all the workmen at the time the said logs or timber are delivered.

By sec. 27 it is provided that any person making payment under such contract without requiring the production of the "pay roll or sheet as mentioned in sec. 26," shall be liable at the suit of any workman for the amount due any such workman.

I am of opinion that the words "pay roll or sheet" in sec. 27 must be read in the same sense as the same words in sec. 26. In sec. 26, it is evidently meant that the production of the pay roll or sheet is not sufficient in itself, but it must be shewn that the wages have been actually paid. This view is rendered more clear from the words which follow, requiring the person to whom payment is to be made to shew the amount due for wages, when not paid, irrespective of the pay roll or sheet.

Digitized by Google

Now, in sec. 27 the only words used are "pay roll or sheet," as mentioned in sec. 26, and no mention is made of any requirement to shew a statement of the amount of wages due where not paid.

I am also of opinion that unless the person to whom payment is to be made produces the pay roll or sheet with evidence of the payment of the wages to the person making payment, such last mentioned person is liable for the wages if he makes payment under the contract, and it afterwards turn out that the wages have not been paid.

In this case no such pay rolls or sheets were produced for the months of November and December.

It is true a statement of the amount of wages due was produced to defendants, but that is not sufficient, in the view I take of the Act. To say that the production of a statement of the amount of wages due, irrespective of payment, is sufficient to relieve defendants from liability under sec. 27, would be to defeat the plain intention of the Legislature, and would render both secs. 26 and 27 meaningless.

Defendants gave Farnell credit on their books for the value of the logs furnished during the two months in respect of which wages are due, and I think this is a payment to him under the contract.

Judgment for plaintiff with costs.

---

## BRITISH COLUMBIA.

### (NELSON.)

MORRISON, J. FEBRUARY 11TH, 1905.

TRIAL.

## TARRY v. WEST KOOTENAY POWER AND LIGHT CO.

*Rectification of Deed—Mistake—Grant of Right of Way with Exclusive Possession—Compensation.*

Plaintiff had executed in favour of defendants a deed of a strip of land upon which defendants' pole line was. The words of the grant were as follows: "The party of the first part doth hereby give and grant unto the said party of the

Digitized by Google

second part, its successors and assigns forever, the right of way as the same is laid out on the sketch 'A' hereto annexed 300 feet wide by a length of 80 chains or thereabouts over and upon the said in part described lands . . . for a pole line and any other purpose which the said party of the second part, its successors or assigns, may use the same for, and the sole and exclusive and absolute possession of the said right of way 300 feet wide by a length of 80 chains or thereabouts over and upon the said described land." Plaintiff now sought to have this deed rectified, alleging that it was in effect a conveyance of the fee simple, whereas it was only intended to confer a right or license to occupy the land for the specific purpose of maintaining a pole line thereon. Plaintiff also claimed damages for trespass.

S. S. Taylor, K.C., for plaintiff.

A. H. MacNeill, K.C., for defendants.

MORRISON, J.—In one branch of this case plaintiff seeks rectification of his deed to defendants granting a right of way 300 feet wide for a pole line across plaintiff's lands. It is urged by plaintiff that the words in the deed giving to defendants "the sole and exclusive and absolute possession of the said right of way" are comprehensive enough to deprive him of any right to enter upon the 300 foot strip for the purpose of cultivating it. He further urges that he did not intend to exclude himself from the possession for agricultural purposes, and that he entered into the agreement by mistake. The evidence to warrant ratification must be of the strongest possible nature. If the mistake were clearly made out by admissible and satisfactory evidence, or were admitted, the instrument would be rectified: Snell's Equity, 13th ed., p. 461. Here, the mistake, if any, was not proved. The existence of a right of way is quite consistent with a right of cultivation; and I am of the opinion that the deed grants only the right of way, leaving to plaintiff such right of cultivation as may be consistent with the grant, and such as will not interfere with defendants' poles or pole line.

The other branch of the case is laid in trespass. I find that defendants are not trespassers. Plaintiff cannot get compensation for the lands in this action. His remedy, if any, is by arbitration under the company's special Act.

The action is dismissed with costs.

Digitized by Google

## BRITISH COLUMBIA.

### (VICTORIA.)

MARTIN, J. MARCH 10TH, 1905.

CHAMBERS.

## ALASKA PACKERS ASSOCIATION v. SPENCER.

*Trial—Jury—Previous Order not Appealed against—Method of Trial.*

Summons on behalf of plaintiffs for an order setting aside an order made in October, 1902, for a trial with a special jury, and for an order that the action be tried by a Judge without a jury, or, in the alternative, that, notwithstanding the order for trial with a special jury, it be directed that the action be tried without a jury, on the ground that the issues require scientific investigation which cannot conveniently be made by a jury.

The action was for damages caused to a sailing ship by reason of a tug belonging to defendant letting the ship run on to the rocks from the vicinity of which she was endeavouring to tow her. See ante p. 103.

E. V. Bodwell, K.C., for plaintiffs.

F. Peters, K.C., for defendant.

MARTIN, J.:—On 31st October, 1902, an order was made by my brother Irving, presumably under Rule 333, for the trial of this action by a jury. This order was made after hearing both parties, and was not appealed from, and is, despite the abortive trial, not yet exhausted. On the hearing of that application it must be presumed that both parties brought to the attention of the learned Judge everything it was proper to bring so as to enable him to rightly exercise the discretion conferred upon him under Rule 332, and it is clear that there was jurisdiction to make the order he did make. Nevertheless, it is now asked that an order be made, under Rule 332, for trial without a jury, notwithstanding the existing order, on the ground that the case "cannot in (my) opinion conveniently be (tried) with a jury."

To this the objection is first taken that while the prior order of a Judge of equal and general jurisdiction stands, I

Digitized by Google

have no jurisdiction to directly overrule it, or even indirectly, by ignoring it, or in any way assume to review the discretion which was exercised by him on the original application.

This point has come up before in this Court in the cases of Brigman v. McKenzie, 6 B. C. R. 56; In re Kootenay Brewing Co., 7 B. C. R. 131; and King v. Boultbee, 7 B. C. R. 318; and it is clear from them that while the last case raises some doubt as to the proper course to be taken in the case of an order of a Judge having statutory jurisdiction, yet in that of a Judge of a Court of general and original juris diction, the only way under our practice to get rid of an order made after hearing both parties is by appeal; I note we have nothing in our Supreme Court Act or Rules corresponding to sec. 50 of the English Judicature Act of 1873 (Y. P., 1905, p. 94). It is therefore my duty to abide by the prior order so made as aforesaid, because though the full Court may by virtue of Rule 683 disregard an interlocutory order in a proper case, it is not open to me to do so.

The summons will, consequently, be dismissed with costs to defendant in any event.

---

## BRITISH COLUMBIA.

### (VICTORIA.)

MARTIN, J. MARCH 13TH, 1905.

TRIAL.

## GAMBLE v. SPENCER.

*Principal and Agent—Contract on Behalf of Company not Formed—Personal Liability—Evidence.*

Action by a firm of provincial land surveyors to recover $657 for surveying and money expended. The defendant held an option on a group of mineral claims, and in order to obtain a Crown grant she was desirous of having certain surveys made, and so wrote and telegraphed to plaintiffs to do the work. At the time she wrote her first letter the company for which she purported to sign as manager or secretary had not yet been formed.

W. C. Moresby, for plaintiffs.

J. A. Russell, for defendant.



Digitized by Google

MARTIN, J.:—Owing to the haphazard way in which defendant mixes up singular and plural numbers in her letters, it is not easy to determine exactly what she had in mind. It is clear, however, that, at the time she sent the letter of 24th May, and telegram of 25th May, the Jubilee Mines, Ltd., was not the owner of the option she then held from Nixon and Driscoll, and she was not, legally speaking, either secretary or manager of that company, though she says it was in that capacity that she purported to sign said letter and telegram.

Alternatively, then it is said that she was acting for the syndicate on whose behalf she says she took said option, but, even if so, that does not help her, for on her own statement she purported to act on behalf of the company.

On the other hand, I am satisfied that plaintiffs thought they were dealing with her personally, and that they were justified in so thinking appears by many passages in her frequently vague letters, particularly in that of 27th May, wherein she says: "I shall be glad to pay you whatever it is worth for your trouble;" and in the telegram of 27th May, wherein she says: "Act as my agent with full authority to protect option;" and the confirmatory letter of the following day.

Such being the view I take of the facts, there will be judgment for the balance sued for, less the admitted credit of $7, with costs on the appropriate County Court scale.

---

## BRITISH COLUMBIA.

### (VICTORIA.)

HUNTER, C.J. MARCH 17TH, 1905.

TRIAL.

### ROGERS v. FRECHETTE.

*Trespass—Timber—Conversion—Joinder of Defendants and Causes of Action—Purchasers from Trespassers.*

Action for trespass, tried at Grand Forks.

J. A. Macdonald, K.C., and A. C. Sutton, for plaintiff.

A. M. Whiteside, for defendants the Yale-Columbia Co.

Digitized by Google

W. H. P. Clement, for defendants Lequime and Gauthier.

J. D. Spence, for defendants Frechette and the Hunter-Kendrick Co.

HUNTER, C.J.:—This action, as originally launched, was brought against all five defendants for damages for trespass to plaintiff's mineral claim in felling and carrying away some timber thereon, and for the value thereof.

The defendant Frechette had a contract for the delivery of ties to another defendant, the Yale-Columbia Co., and agreed with Gauthier, another defendant, to procure the ties on the latter's pre-emption, the consideration to the latter being one cent per tie. Frechette's men felled a number of trees by mistake on plaintiff's mineral claim, which were cut up into ties, some being taken away by defendant Lequime, who purchased them from defendants the Hunter-Kendrick Co., who had taken them over from Frechette.

The Yale-Columbia Co., not having been shewn to have had any share in the felling or removal of the timber, or to have received any of the ties, were dismissed out of the suit, and by reason of the decision in Sadler v. Great Western R. W. Co., [1896] A. C. 450, the plaintiff was put to his election as to what cause of action he would proceed with against the remaining defendants. He accordingly decided to proceed with that in respect of some 25 trees which were cut on the portion of Gauthier's pre-emption which overlapped plaintiff's mineral claim. It was not seriously disputed that, as the latter was the elder location, plaintiff had such an interest in the standing timber as would given him a good title as against any trespasser.

It was urged, however, on behalf of defendants, first, that there was no evidence shewing that any ties cut out of these 25 trees were taken away by Lequime or the Hunter-Kendrick Co., and that in any event the cause of action, if any, was not joint. In my opinion, there is not sufficient evidence to satisfactorily establish that Lequime or the Hunter-Kendrick Co. either carried off or received any ties which came out of the 25 trees; but, even if there were, I am of opinion that the liabilty is not joint but separate, that is to say, the liability of Frechette and Gauthier for felling and cutting up the timber is separate from that of Lequime and the company (if any) for converting the ties. I say if any, for I would not be understood as asenting to the proposition that A. can

Digitized by Google

bring an action against C. who fells his timber, B. who carries it off, C. who manufactures it into lumber, D. the proprietor of the planing mill, E. the furniture maker, F. the retal trader, G. the purchaser, H. the transferee, and so on. If this were so, a plaintiff could overwhelm with litigation ad infinitum a whole community, the different members of which were in total ignorance of the acts of the others. The taint of tort must stop somewhere, and, in my opinion, if the chattel sued for has been essentially changed, the first innocent transferee after alteration stops the chain of liability, and in this case I think it stopped with Gauthier and Frechette. There is nothing to shew that either the Hunter-Kendrick Company or Lequime knew either at the time of purchase or removal that the ties in question were the product of the tortious acts of Frechette, although as regards Lequime (and probably also as regards the Hunter-Kendrick Company) if plaintiffs had waived the tort quoad the felling of the trees, but claimed the ties qua ties, no doubt he would be liable as for a conversion if he took any of them away whether or not he knew of their tortious origin. At any rate, assuming there was sufficient evidence to involve either the company or Lequime in the taking of any ties which came out of these 25 trees, neither can be made liable in the same action with Gauthier and Frechette, as there was clearly no joint conversion with them. The practice authorizes the joinder of several causes of action against the same defendants, but not separate actions against different groups of defendants. It will have to develop further before different claims sounding some in trespass, and others in trover, can be linked together against different sets of defendants. But, although this is so, no question as to whether I ought to allow any further election arises, as plaintiff by electing to proceed on account of the 25 trees has clearly elected to proceed against Gauthier in any event, as he is not liable on account of the other trees.

The result is that as against Gauthier and Frechette there will be judgment for $200, which includes both the value of the 25 trees, and damages for the invasion of plaintiff's rights and costs; but as regards the Hunter-Kendrick Company and Lequime the action will be dismissed with costs as per statute.

Digitized by Google

## BRITISH COLUMBIA.

### (VICTORIA.)

HUNTER, C.J. MARCH 17TH, 1905.

TRIAL.

### LEQUIME v. BROWN.

*Contract—Logging—Moneys Advanced—Scaling Logs—Conditions of Contract.*

Action for moneys advanced to defendant, tried at Grand Fords.

W. H. P. Clement and J. D. Spence, for plaintiffs.

J. A. Macdonald, K.C., and H. C. Hanington, for defendant.

HUNTER, C.J.:—Plaintiffs and defendant had entered into a written agreement whereby the latter was to deliver at the plaintiffs' mill between 1,500,000 and 1,700,000 feet of logs, which was afterwards orally varied by plaintiffs agreeing to take whatever quantity in excess of 1,700,000 feet defendant could supply within the time stipulated.

Advances were made by plaintiffs from time to time until defendant became indebted to the extent of $9,257.18, as found by the registrar. Plaintiffs admit delivery of 1,077,345 feet, which would offset the advances to the extent of $4,578.75, being at the contract rate of $4.25 per M., so that, after making certain deductions, plaintiffs contend that defendant had received the sum of $4,264.07, for which plaintiffs have got no consideration.

The first defence was that a sufficient quantity of logs had been delivered to offset the claim, but, without going into details, I will only say that the time and labour spent by the defendant in manufacturing this defence would have been better devoted to making provision for the settlement of a just debt.

The only other defence was that, by the terms of the contract plaintiff Lequime was to scale the logs, but the logs were not all scaled by him, and in fact most of them were scaled by different hands at the mill as they went to the saw.

Digitized by Google

Some again were not scaled at all, being scattered over different portions of Smelter Lake, but plaintiffs had made what they consider a reasonable estimate and agreed to waive the clause requiring their delivery at their mill-boom. As to this question of scaling, I think that plaintiffs waived the clause requiring scaling by Lequime, as they knew that it was being done by the mill-hands, and did not object to it. In fact, obviously the most convenient time to scale logs is when they come to the saw, and I doubt very much whether the clause means anything more than that the scaling should be done by the parties of the first part as owners of the mill and purchasers of the logs. It could not, for example, have been intended by the parties to this very roughly drawn contract that if Lequime had died before the logs were all scaled [illegible] should come to an end, and that the owners of the mill could refuse to pay for logs delivered, but not scaled on account of Lequime's death.

I intimated, however, at the trial that I thought an allowance of 100,000 feet ought to be made in favour of the defendant to cover possible errors in the estimate, and I am satisfied that the errors, if any, could not exceed that amount, and that defendant is indebted to the plaintiffs in at least the sum of $4,264.07.

The plaintiffs are therefore entitled to judgment for this amount with costs.

---

## BRITISH COLUMBIA.

### (VICTORIA.)

IRVING, J. MARCH 28TH, 1905.

CHAMBERS.

### Re BOWKER and RICHARDS.

*Water and Watercourses—Line Fences and Watercourses Act—Award of Fence Viewers—Appeal—"Adjoining" Lands.*

Appeal from a decision of fence viewers.

R. T. Elliott, for appellant.

W. J. Taylor, K.C., for respondent.

Digitized by Google

IRVING, J.:—The Line Fences and Watercourses Act, R. S. B. C. ch. 76, enacts (sec. 4) that "when it is in the interests of the owners of adjoining lands (1) to open, keep up, cleanse, and repair any existing or natural watercourse . . . so as to prevent the flooding of the adjacent lands, and (2) to open and make a ditch or watercourse for the purpose of letting off surplus water from swamps or low miry lands, in order to enable the owners or occupiers thereof to cultivate or improve the same, such parties shall (1) open a just and fair proportion of such existing natural watercourse, and (2) shall open and make a fair proportion of such ditch or watercourse according to their several interests."

Section 8 provides that "where it appears to the fence-viewers that the owner or occupier of a tract is not sufficiently interested in the opening of a ditch to make him liable to perform any part thereof, and at the same time that it is necessary for the other party that such ditch should be continued across such tract, they may award the same to be done, kept open, and maintained at the expense of such other party, and after such award the last mentioned party may open and at all times repair and maintain the ditch or watercourse across the tract at his own expense without being a trespasser."

In pursuance, so it is alleged by Mrs. Richards, the respondent, of the provisions of this Act, the fence-viewers met and made an award between Mrs. Richards and Mrs. Bowker by which it was awarded and ordered that Mrs. Bowker should deepen and cleanse the drain where it runs through her property at a cost of not less than $100, and afterwards maintain the same.

From that award Mrs. Bowker appeals. Maps were put in at the hearing, and I personally examined the ground in question.

It is necessary that the situation of Mrs. Richards's land with reference to the drain in question, and Mrs. Bowker's land, should be understood.

The lots run in the following order from west to east: First, there is a lot occupied by a house, owner's name unknown; then Mrs. Richards's property; then the Willows property, some 210 feet in width; then the race track road; then seven acres of Mrs. Bowker's. The north branch of the Cadboro Bay Road separates these seven acres from Beaumont's property, which intervenes betwen Mrs. Bowker's seven-acre lot and the main portion of her property. The

Digitized by Google

watercourse in question begins at the back of the most westerly of these lots. It passes across Mrs. Richards's lot; thence through the Willows property, 220 feet, to the race track road, where it passes through a culvert; thence through Mrs. Bowker's seven-acre field, 750 feet; thence under the Cadboro Bay Road, 65 feet; through Beaumont's property 230 feet, into Mrs. Bowker's ranch; and so on down to the sea.

The award purports to be an award between owners of *adjoining* lands. Section 4 declares that "when it is in the interest of owners of adjoining lands," and "owners of adjoining lands shall," etc. I do not think that the lands of Mrs. Richards and Mrs. Bowker can be called "adjoining lands." The Willows property, some 210 feet in width, separates Mrs. Richards's property from Mrs. Bowker's most westerly property, i.e., seven-acre field, and her ranch is separated from Mrs. Richards's lot by the Willows, two roads, and Beaumont's property.

The word "adjoining" is different from the word "adjacent." "Adjoining," as its derivation implies, signifies being joint together; "adjacent" is simply lying near. The Watercourses Act, in my opinion, does not apply to this case, as Mrs. Richards and Mrs. Bowker are not owners of adjoining lands.

But, apart from that question, the ditch which was originally built from the centre of the seven-acre lot as it exists at present is quite sufficient for Mrs. Bowker's purpose. Its present level seems to me to be sufficient for the drainage of all the land lying east of the race-track road. From the examination I made of the premises in December, I was satisfied that the accumulation of water on Mrs. Richards's property was occasioned by the owner of the Willows property deepening his ditch to such an extent that that portion of the ditch which runs through his premises is below the level of the culvert under the race-track road. This culvert acts as a dam and prevents the water flowing into Mrs. Bowker's ditch.

From the foregoing statement of facts it will be seen that the fence-viewers, instead of doing what is authorized by sec. 8, propose to make a person whose ditch is sufficient for her own purposes pay the entire cost of the deepening and maintenance of a ditch for the benefit of another person. This is not contemplated by the Act, and therefore the award of the fence-viewers must be set aside with costs.

Digitized by Google

## NORTH-WEST TERRITORIES.

### (SASKATCHEWAN.)

PRENDERGAST, J. FEBRUARY 23RD, 1905.

TRIAL.

## KENNEDY v. JOYCE.

*Contract — Breach — Sale of Goods — Failure to Deliver — Counterclaim for Refusal to Accept—Damages.*

Action for damages for breach of contract. Plaintiff alleged that defendant had agreed to deliver to him (plaintiff) 200 bushels of oats at 32 cents per bushel, and that plaintiff had paid defendant $25 on account of the contract price; that defendant refused to deliver the amount contracted for, and plaintiff was obliged to go into the open market and buy oats at an increased price. Plaintiff's claim was for a return of the $25 paid by him, and the difference between the contract price and that which he was forced to pay in the open market. Defendant contested plaintiff's claim, alleging that plaintiff had contracted for a whole car of oats, which when they arrived plaintiff refused to accept, and that in consequence defendant was obliged to get rid of them, and that he suffered damages for expenses in selling the oats, which more than extinguished the plaintiff's claim, and which, by counterclaim, he asked the Court to assess on the evidence.

D. T. Smith, Saskatoon, for plaintiff.

H. Acheson, Saskatoon, for defendant.

PRENDERGAST, J.:—As to the plaintiff's claim, plaintiff himself says: "The oats were to cost me 32 cents if Finlayson and Brawley took the balance:" and he adds that Finlayson and Brawley would not take the balance. How can he then say in his statement of claim, without any qualification, that defendant "contracted to deliver him 200 bushels of oats at 32 cents." His own statement under oath is a complete answer to his own claim. Then as to the weight to be given to his evidence, it is only in rebuttal that he states that the freight from Hague was to be added to the 32 cents, and he is, moreover, absolutely contradicted by his own witness Finlayson, as to the quantities which he (Finlayson) and Brawley were to take. That there was a contract is urged by both

Digitized by Google

parties, as well as the fact that the $25 was paid on account of oats, and I must come to the conclusion, with the shipping bill and other facts before me, that the contract was for the whole car.

Now as to the counterclaim, the defendant is entitled to damages. But the amount he claims, $123.40, after having sold the car for more than the contract price, including freight and demurrage, is on the face of it preposterous. I will allow him all that he claims for demurrage, unloading, and carpenter work, being $12. I will allow him $5 instead of $10 for the lumber, which is not a total loss, and $1 instead of $5 for space occupied in his stable. All this amounts to $18. The damages claimed for keep of team are too remote, and cannot be considered at all. Next comes defendant's charge for his time, $56. Now he sold 37 bushels to Jordan, and 938 bushels to Abernethy right from the car, leaving 452 bushels to be sold at the barn. This would be $56, not to speak of the $27 claimed as expenses just for the time and labour in selling 452 bushels from the barn. This is of course beyond all reason, and, even if defendant incurred all these damages, plaintiff cannot be made responsible for the most injudicious way, to say the least, in which defendant disposed of his grain. Having however to assess damages, and defendant preferring a measure of the same which cannot be countenanced, I will base the same upon the price at which these oats could have been disposed of without delay. I feel satisfied that defendant could have very quickly disposed of the remaining 452 bushels at 28 cents, or a loss of 4 cents per bushel, irrespective of freight. Even assuming that he could not have disposed of them right away from the car, even at that price, he surely could have done so within a day or two from the barn. The loss on the 452 bushels would have been $18.08, and I allow this as a fair measure of damages. Defendant must of course also be allowed freight from Hague to Saskatoon, $34.70. Defendant's damages then are:

| | |
|---|---|
| Demurrage, removing grain, lumber, etc... | $18 00 |
| Freight from Hague ..... | 34 70 |
| Time and labour selling 452 bushels ..... | 18 08 |
| | $70 78 |

But the plaintiff is entitled to two credits:

1st. Credit of $25 paid by him on account. The rule of law by which he cannot recover back this amount paid on a contract which he now repudiates, in no way prevents him

Digitized by Google

from setting off the same in rebate of damages. 2nd. Defendant having sold to Jordan and Abernethy from the car 976 bushels for $331.87, while the same quantity at 32 cents (contract price) would only fetch $312, plaintiff is entitled to the difference, $19.87. The total credit of the plaintiff is then $44.87. To sum up:

| | |
|---|---|
| Damages as above | $70 78 |
| Credit to plaintiff | 44 87 |
| Balance to defendant | $25 91 |

Plaintiff's claim is dismissed, and on counterclaim judgment is for defendant for $25.91 with costs.

---

## NORTH-WEST TERRITORIES.

### (EASTERN ASSINIBOIA.)

WETMORE, J. FEBRUARY 28TH, 1905.

TRIAL.

### SCOTT v. TASKER.

*Sale of Goods—Contract—Payment of Price—Mistake—Recovery back — Counterclaim — Delay — Damages—Evidence.*

Action to recover a sum of money paid on the purchase price of wheat, which plaintiff alleged was paid under mistake and on the assumption that there was more wheat purchased than the returns justified, plaintiff being bound to give the Fort William prices, less certain charges for shipping, etc. Defendant alleged that plaintiff had not paid all that was properly owing him, and counterclaimed for the balance; he also alleged that plaintiff had unnecessarily delayed shipping the wheat, and had negligently allowed it to become heated and damaged, and counterclaimed for damages.

B. B. Teed, Alameda, for plaintiff.

J. T. Brown, Moosomin, and J. D. Murphy, Oxbow, for defendant.

WETMORE, J.:—The evidence in this case is most unsatisfactory both on the part of plaintiff and of defendant, and I

Digitized by Google

have had great difficulty in reaching any conclusion with respect to it. The evidence establishes that plaintiff hauled 1,195½ bushels of wheat. Defendant contends that he had more wheat than that, but the evidence does not satisfactorily establish it, and, moreover, if he had, the evidence rather goes to establish that the quantity would be decreased to quite the difference by the heating of the wheat, which undoubtedly took place. Now, a portion of this wheat was shipped away in one car; the balance remaining was about 413 bushels; and this action arises out of what is alleged with respect to this 413 bushels. Plaintiff, therefore, must have shipped in the first shipment about 782½ bushels; he gave defendant in payment for the proceeds of that shipment a cheque for $426.90. He alleges that in closing up that particular deal he did not charge defendant with the price of hauling this 1,195½ bushels, but he did charge him with commission at one cent a bushel upon the shipment, which, as I say, must have been about 782½ bushels. This shipment graded as No. 3 Northern, and, according to plaintiff's own testimony, the price realized was 73 cents a bushel at Fort William, which would net about 63 cents a bushel at Alameda. Now, 782½ bushels at 63 cents a bushel would amount to $492.97, and if he only deducted from that the commission on the sale, at one cent a bushel, it would amount to $7.82, leaving a balance of $485.15 in favour of defendant; but the cheque was only for $426.90, as stated. Plaintiff states that he has under his control a statement shewing how this sum of $426.90 was reached, but he does not produce it, and I can only go by the evidence as stated. The cheque, therefore, certainly does not bear out what he states; but, if we deduct the price of hauling 1,195½ bushels at 5 cents a bushel, which is the amount defendant states he agreed to pay, and which would amount to $59.77, and if we also deduct $7.82, which would represent the commission on 782 bushels at 1 cent a bushel, making a total of $67.59, that deducted from $492.97 leaves a balance of $425.38, which very nearly represents the amount of the cheque; and the difference might be accounted for very easily by the real quantity of wheat forwarded, because, according to the evidence, the 413 bushels was only arrived at by an approximation. I cannot escape, under the evidence, two conclusions: first, that the agreed rate for hauling this wheat was 5 cents a bushel and not 6; and second, that the plaintiff was entitled to a commission on the sale of 1 cent a bushel. That seems to me to be the case presented by the evidence. The difficulty I see, however, is that defendant does not in his pleadings set

Digitized by Google

up that this agreed price for hauling the wheat ever was paid. The fact of the business is that the matter under the evidence is left in such confusion that substantial justice would be done to the parties by throwing the case out of Court, which I will do. According to the plaintiff's testimony the proceeds of the 413 bushels of wheat in question realized $211.99. He only gave a cheque for $200. I have found that he has been paid for the hauling of the wheat and his commission for selling 782 bushels. That would only leave coming to him commission on 413 bushels, or, as he contends, on 382 bushels. Strictly there is a balance of between $7 and $9 due defendant. But he does not claim it in his pleadings.

As to defendant's counterclaim, it is sufficient, I think, to state that defendant has not established it to my satisfaction at all. There is no evidence upon which I can lay my hand which is definite at all; it is a mere matter of conjecture, and of what defendant thinks; and he seems to have had no experience in such matters at all. The evidence satisfies me that the heating of the grain took place at defendant's farm, and it does not satisfy me that it could have been prevented by hauling the grain and keeping it in sacks. Nor does the evidence satisfy me that defendant, whose duty it was to order the cars, did order them within the proper time, or, rather, that the omission to ship the last shipment sooner was not owing to defendant's own fault in not furnishing the car. Nor does the evidence satisfy me that, owing to the delay in hauling the grain, if there was any delay, the wheat depreciated in value in the meanwhile; the evidence is rather the other way.

The result of the whole conclusion is, that there will be judgment for defendant on plaintiff's claim, and for plaintiff on the counterclaim. Defendant will have the general costs of the action. Plaintiff will have such costs as accrued exclusively by reason of the counterclaim; that is, for instance, if there were any of plaintiff's witnesses who were called exclusively for the purpose of meeting the counterclaim, plaintiff will be entitled to have the costs of such witnesses taxed to him. There will be one taxation of costs, and the costs of each party to be set off one against the other, and the person in whose favour the balance may be after such set-off to have judgment and execution for the amount of such balance.

Digitized by Google

## NORTH-WEST TERRITORIES.

### (EASTERN ASSINIBOIA.)

WETMORE, J. MARCH 14TH, 1905.

CHAMBERS.

## REX EX REL. PARK v. STREET.

*Municipal Election—Motion to Set aside—Rejection of Ballot Cast for Relator—Concurrence of Relator in Rejection—Incapacity through Drunkenness.*

Summary application in the nature of a quo warranto to set aside the election of the respondent as mayor of the town of Whitewood.

E. L. Elwood, Moosomin, for the relator.

T. C. Johnstone, Regina, for the respondent.

WETMORE, J.:—At the last annual election for mayor and councillors for the town of Whitewood, the relator, Park, and the respondent, Street, were respectively candidates for the office of mayor, Only two councillors were to be elected at such election, and more than two persons were nominated for the office. A ballot was cast which was marked for the relator as mayor, and for three candidates for the office of councillor. The returning officer held that this ballot, having been marked for more candidates than were required to be elected, was bad, and rejected it, refusing to count it, so far as the candidates for mayor were concerned, for either one of the candidates, and rejecting it altogether. The result was that, leaving out the rejected ballot, 28 ballots were cast for the relator for the office of mayor and 28 for the respondent. The returning officer declared that there was a tie and gave a casting vote for the respondent. The relator, asserting that this ballot should have been counted for him, instituted proceedings in the nature of a quo warranto under sec. 56 and following sections of the Municipal Ordinance, C. O. ch. 70.

The respondent set up; first, that the ballot in question was properly repected; and, second, that, if not, the relator had concurred in its being rejected. . . . The only question of fact that was raised at the hearing was whether the

Digitized by Google

relator had so concurred in the rejection of this ballot; the other facts which I have stated were admitted.

The overwhelming weight of evidence satisfies me that the relator did concur, in so far as any words he used were concerned, in the rejection of this ballot in question. The testimony of the respondent and of Krag and Stoddart establishes to my satisfaction that when this ballot was reached the relator was present, and that on the ballot being opened the returning officer stated in effect that it was marked for more persons than there were candidates to be elected, and that at least some of the persons in the room said "throw it out," and that the relator also said "throw it out," or words to that effect. If the relator was in his sober senses and capable of understanding what was being said and done in the room, that would amount to consenting to the rejection of the ballot.

Mr. Joseph Lamont was called on behalf of the relator, and he denies that the relator was present when this ballot was reached and rejected, and he denies that the relator used the expression "throw it out." Mr. Lamont, however, evidently testified to the fact that the relator did not use this expression with considerable reluctance. He at first confined himself to testifying that he did not use the expression so far as he had heard, or to his knowledge, or that he was satisfied that the words were not used, and it was only after being pressed with the question two or three times—whether he would swear that they were not used—that he answered that he would swear that they were not used. The relator was also called, but his testimony upon the question as to whether these words were used or not is of no importance, because the most he can say is that he does not remember using them. I cannot, with such testimony as this, in the face of the testimony of the three witnesses on behalf of the respondent, whose testimony I have referred to, come to any other conclusion than that the words were used, and that the respondent was present when the ballot was reached and rejected.

It was urged on behalf of the relator that, this being a matter of public interest, the relator could not, by any consent on his part, give validity to the election of the respondent, if such election was as a matter of fact invalid by reason of the rejection of this ballot. I think this point would have been well raised if some other person who had not concurred in the rejection of the ballot and was qualified to be a relator, had been the relator, but the authorities seem

Digitized by Google

abundantly clear that a person who had concurred and assented to the irregularity or act complained of, cannot be a relator in a matter of this sort. The law on the subject was thoroughly ventilated in a very well considered judgment of Harrison, C.J., in Regina ex rel. Regis v. Cusac, 6 P. R. 303. The authorities upon the subject have been gathered there, and it is not necessary for me to refer to them in this judgment. The conclusion to be drawn from these authorities is, that where a person, with a knowledge of an irregularity, concurs in it, he will not be heard as relator in a proceeding to set aside the election on the ground of the irregularity in which he so concurred.

It was contended here, however, that the evidence establishes that the relator was in such a state of drunkenness that he was not aware of the irregularity, and had not the consenting mind to concur or acquiesce in the matter. The onus of establishing that is on the relator, and it is not sufficient to establish by the evidence that the relator was under the influence of liquor, or was drunk. It must be established that he was in such a state of drunkenness as not to know what he was about. The evidence does not go far enough to establish to my satisfaction that the relator was in that state. And I think, before I should arrive at the conclusion that he was in that state, the evidence should be of a very clear and satisfactory character. The witness Lamont testifies that the relator was "awfully drunk," and incapable of doing any business, but the only reason he seems to have for reaching that conclusion was because the relator bought a string of bells at Mr. Lamont's store that night, and kicked about it and said he never got them. That conclusion was not reached by him from anything he observed or that transpired at the time the ballots were counted, but from something that happened afterwards, and there is nothing to establish how long afterwards. This is rendered more pointed by the fact that the evidence establishes that the relator had been drinking after the election proceedings had been concluded. The relator himself will not testify that he was so drunk as not to know what he was about. I have no doubt that he was under the influence of liquor and considerably under the influence of liquor, but that, to my mind, is not going far enough. All the relator will swear when interrogated as to his condition as to sobriety is as follows:

Q.—"Well, now, what was your condition as to sobriety?" A.—Well, I can tell you that I don't remember anything that occurred there very much."

Digitized by Google

Q.—"Well, what do you say about your condition as to sobriety that evening that the counting took place? A.—Well, I don't think I was sober at all."

That is the furthest that the relator will go, and if he himself will not state that he was in such an incapable condition as to warrant my coming to the conclusion that any consent given to the irregularity by him was invalid, he cannot expect me to come to that conclusion. On the other hand, the respondent testifies in effect that "while the relator was under the influence of liquor, he was not so far under its influence as to render him incapable of doing any business." In fact he swears that "he was quite capable of doing business." The witness Krag swears that "he wouldn't say he was very drunk, he would say he was slightly under the weather." And Stoddart swore that "he was not very drunk, intoxicated, under the influence of liquor." The returning officer, Baldwin, does not afford me very much assistance in coming to any conclusion; he testifies that "the relator was drunk," and that "he was speaking incoherently." And that is all.

There is another circumstance which was established in evidence which is pertinent to the matter I am now discussing, and tends to shew that the relator had some knowledge of what was going on. It is quite clear to me that he endeavoured to induce the returning officer not to give his decision that evening. That, as I understand it, did not have relation to his decision with respect to rejecting the ballot in question, but it had relation to the returning officer giving his casting vote. The relator recollects that he made this request of the returning officer.

Under these findings I have come to the conclusion that the relator was not in a position to institute these proceedings by reason of his having concurred in the very irregularity which he now seeks to set up as a ground for impeaching the election.

I will therefore order the writ of summons to be discharged, with costs to be paid by the relator.

The respondent to pay the relator's costs of and incidental to the preliminary objections raised by the respondent.



Digitized by Google

## NORTH-WEST TERRITORIES.

### (EASTERN ASSINIBOIA.)

WETMORE, J. MARCH 17TH, 1905.

CHAMBERS.

### RE CANN.

*Assessment and Taxes—Tax Sale—Refusal to Confirm—Land Vested in Crown—Recommendation of Patent for Homesteader—Witnesses—Costs.*

Application by the executrix of the will of Robert Cann to confirm a transfer to him by the treasurer of Carlyle school district No. 312, of the south-east quarter of section 30, township 7, range 3, west of second, for arrears of school taxes.

E. A . C. McLorg, Moosomin, for the applicant.

J. T. Brown, Moosomin, administrator of the estate of Douglas Buchanan, in person.

WETMORE, J.:—The transfer was dated 23rd September, 1899, and the sale was made on 28th August, 1898. The sale, therefore, must have been made under the provisions of Ordinance No. 2 of 1896. No patent for this land had been issued at the date of the sale, nor has any patent been issued yet, so far as I know. The property was homesteaded on behalf of one Douglas Buchanan, and it was conceded on behalf of the representative of Buchanan, who appeared to oppose this application, that the evidence established that a recommendation for the issuing of a patent to Buchanan had been approved on 19th January, 1894.

The assessment upon this land must of course have taken place prior to the date of sale, and, in so far as the authority to assess is concerned, it must have been regulated either by ch. 59 of the Revised Ordinances, No. 22 of the Ordinances of 1892, or No. 2 of 1896.

The objection taken to the confirmation is, that the land was not liable to assessment because it was property held by Her Majesty. All that is necessary for me to say is that this question was fully considered by me in a judgment given on 11th March, 1904, in the matter of the Trustees of the Spring

Digitized by Google

Creek Public School District, and that clauses 1 and 3 of sec. 130 of Ordinance No. 2 of 1896 are the same as clauses Nos. 1 and 3 of sec. 98 of ch. 59 of the Revised Ordinances, and sec. 103 of No. 22 of 1892, referred to in the Spring Creek case. It has been urged that the fact that a recommendation had issued for the patent in this case, and that Bristow, the homesteader in the Spring Creek case, had vacated the land, distinguishes that case from this. The ratio decidendi in that case, however, is fully applicable to this case. The fact that Bristow vacated the land did not enter into the reason for that decision, nor does the fact that the recommendation for a patent had been issued affect the question. The title to the property is still in His Majesty, and, as I held in the Spring Creek case, while the occupier of the property might be liable to assessment in the way pointed out, the land itself was not liable to be assessed, and the land, not being liable to be assessed, could not be sold in the manner in which this land has been attempted to be sold.

I may add that the case of Attorney-General for the North-West Territories v. Canada Settlers Loan and Trust Co., decided by me on 21st September, 1901, also materially bears upon the question. That was an application to confirm the return of an overseer of a local improvement district, and the confirmation was refused because at the time of the assessment the title was in Her Majesty.

The treasurer, Nixon, was required to make an affidavit in connection with this matter, and he refused to do so. There was an apparent alteration also in a material part of the transfer, and the party opposing the confirmation deemed it advisable to have a summons issue for the attendance of Nixon and also of Richardson, the subscribing witness to the transfer, for examination before me, and summonses were issued and the parties were examined before me, and it was established, first, that the deed was more than a year old at the time the application was made for the summons to confirm, and, second, it was also established to my satisfaction that the alteration was made before the transfer was executed. It was contended that I should, in view of the manner in which these persons, Nixon and Richardson, had acted, mulct them in the costs and expenses of their examination. I would be very much disposed to do so if I could, but I am of opinion that I cannot do so. Section 138 of the Land Titles Act, clause 3, does not, in my opinion, authorize me to do so. That clause only gives me discretion as to costs so far as the parties before me are concerned; that is, I

Digitized by Google

have authority to summon persons before me for the purpose of adjudicating upon the question involved, and I may give costs against them; but neither Nixon nor Richardson were before me in that sense; they only came before me incidentally.

The application to confirm the sale is refused, and the applicant, Margaret Cann, must pay the costs of Mr. Brown opposing the application. Mr. Brown is the representative of Buchanan. But no costs of the examination of Nixon or Richardson will be allowed, because that examination did not improve his case. It established just the contrary of what he hoped to establish by it. On the other hand, I will allow no costs of the examination of these persons to the applicant, Margaret Cann, because it was her duty in the first place to procure these persons to make the necessary affidavits, and I have no doubt her advocate had endeavoured to do so, but failed, and therefore it was quite a prudent matter and proper for Mr. Brown to have these persons examined, and I am of opinion that the ends of justice will be best served by awarding no costs of that examination to either party.

The costs hereby awarded will be taxed by the clerk on the lower scale.

---

## NORTH-WEST TERRITORIES.

### (EASTERN ASSINIBOIA.)

WETMORE, J. MARCH 18TH, 1905.

TRIAL.

### PEASE v. JOHNSTON.

*Sale of Goods — Conditional Sale — Lien — Enforcement — Extra-judicial Seizure — Fees—Amount Due—Tender—Extent of Lien—Moneys Expended in Improving Property.*

Action to recover possession of a pair of horses.

E. A. C. McLorg, Moosomin, for plaintiffs.

J. T. Brown, Moosomin, for defendant Winters.

WETMORE, J.:—The facts of this case, as I find them, are as follows: Defendant Winters sold a pair of horses to defendant Johnston for $275, and the horses were delivered to

Digitized by Google

Johnston. Part of the purchase money was paid, and Johnston and one Terryberry gave Winters a note for the balance, $137.50. The note was dated 8th February, 1904, and was payable to Winters, or his order, on or before 1st November then next, with interest at 8 per cent. per annum till due, and 12 per cent. per annum after due till paid. The note specified that it was "given for one span of horses, grey, three years old, one branded slipper on left hind leg," and contained the following clause: "The title, ownership, and right to the possession of the property for which this note is given shall remain at our own risk in A. Winters until this note or any renewal thereof is fully paid, with interest. And if we make default in payment of this or any other note in his favour, or should we sell or dispose of or mortgage our landed property, or if A. Winters should consider this note insecure, he has full power to declare this and all other notes made by us in his favour due and payable forthwith, and that he may take possession of the property and hold it until this note is paid, or sell the said property by public auction or private sale, the proceeds thereof to be applied in reducing the amount unpaid thereon. And the holder thereof, notwithstanding such taking possession or sale, shall have thereafter the right to proceed against them and recover, and we hereby agree to pay the balance then found to be due thereon."

As it was practically conceded that this note had precedence over the mortgage of plaintiffs hereinafter mentioned, I assume that it was properly registered. While Johnston held these horses in his possession, he executed a mortgage upon them to plaintiffs to secure the re-payment of $222.85 alleged to be advanced by plaintiffs to him. This mortgage was dated 10th February, 1904, and registered the following day. This mortgage contained a provision that should the mortgagees at any time deem themselves unsafe, so far as the security contained in the said mortgage was concerned, it should be lawful for them to take possession of the mortgaged property and dispose of it as to them might seem meet.

The horses were not very well cared for while in Johnston's possession, and they became thin and depreciated in value. For a few days before they were taken possession of by Winters they were running at large on the prairie, and on 9th May, 1904, Winters seized and took possession of them, and retains such possession. The right of Winters to so seize this property is not disputed.

Digitized by Google

Plaintiffs, feeling themselves unsafe in so far as the security was concerned (and it is not disputed that they had good reason to so feel unsafe), caused Winters to be tendered $150 and a memorandum in writing stating that his claim to the horses was satisfied, and requested him to sign the memorandum. I find that a tender of this sum to Winters was made by Croot, plaintiffs' manager, on 21st June last, and another tender was made by Mr. McLorg, their advocate, on 22nd June, when the memorandum in writing was also tendered for signature. Defendant Winters refused to accept the amount tendered or to sign the memorandum or to deliver the horses to plaintiffs. This tender was made on the amount due to Winters upon the note in question.

From the time that Winters took possession of these horses down to the time that the tender was made, he kept them in his stable, fed and cared for them, and he did not do anything with them except occasionally drive them, which was only the ordinary exercise they required for keeping them in proper condition. He did no more than give them the ordinary care and attendance which horses in the condition in which these horses were would require, except, possibly, to overfeed them with oats. The horses being thus properly cared for naturally came back, or were coming back, to their nomal condition, and I have no doubt their value was increased over what it was at the time Winters took possession of them.

Winters sets up that the tender made was not sufficient, and that he was entitled to receive not only the amount secured by the note on its face, with interest, as therein provided, but was also entitled to be made whole for the expense of seizing and taking possession of these horses and for keeping them. He places the amount payable for the seizure at $3 and for the care of the horses at about $1.05 per day, taking into consideration the value of hay and of oats at the time, and the value of the labour and time of a man in looking after them. I think the estimate of $3 for taking possession is exorbitant in any circumstances. I think that a reasonable price to pay for taking care of these horses would be not more than 65 cents a day for the pair. I find that the horses could have been put out and cared for at that price.

I have come to the conclusion under the provisions of sec. 2 of ch. 34 and sec. 7 of ch. 44 of the Consolidated Ordinances, that Winters is not entitled to demand for the seizure and keeping possession of these horses more than is prescribed by the schedule of the Ordinance, ch. 34, above

Digitized by Google

mentioned. I hold the seizure to have been an extra-judicial seizure, and that it is therefore embraced in sec. 2 of ch. 34 referred to. By virtue of sec. 7 of ch. 44, referred to, Winters was bound, if he took possession of this property, to retain it in his possession for at least 20 days, and the buyer or any one claiming through him was entitled to redeem the same upon payment of the amount actually due thereon and the actual necessary expenses of taking possession.

The plaintiffs in this case were persons claiming through the buyer, and were entitled to redeem. That was not questioned. But it is very ingeniously argued that, as Winters had a lien upon this property, he was entitled to add to his security, and charge against the property mentioned, the expense of caring for these animals caused by such possession because he improved the value of the property. It was urged that the case was the same in principle as the cases decided with respect to mortgages on real property in which it was held that the mortgagee in possession was entitled to add to his security and charge against the land the costs and expenses of permanent improvements made on the land, not to exceed the increase in value of the property by such improvements, and, that being so, the money so expended for care and keep became due on the goods and were embraced by the words in sec. 7, "the amount actually due thereon." In the first place, no case was cited to me nor can I find any in which it was held that a person holding a lien upon personal property has the right to make such charges against the property; in fact, the decisions are quite the other way, and it is only necessary to refer to the case cited by Winters's advocate at the trial—Somes v. British Empire Shipping Co., 8 H. L. C. 338, 11 Eng. Rep. 459. I refer to the judgment of Lord Wensleydale, at p. 345 of 8 H. L. C. He is reported as follows: "Two principal points have been raised in this case. The first is whether if a person who has a lien upon any chattel chooses to keep it for the purpose of enforcing his lien, he can make any claim against the proprietor of that chattel for so keeping it. No authority can be found affirming such a proposition, and I am clearly of opinion that no person has by law a right to add to his lien upon a chattel a charge for keeping it until the debt is paid. That is in truth a charge for keeping it for his own benefit, not for the benefit of the peson whose chattel is in his possession." This view was practically concurred in by all the members of the Court. As I understand it, what is intended by the party keeping the property for his own benefit is that he is keep-

Digitized by Google

ing it for the purpose of enforcing his claim, and that he will not be allowed therefore to make such charge. I hold under that decision that Winters as a lien-holder had no right at common law to make such charge, and he certainly has been given no right to do so by the Ordinance. It may be a hardship that he is compelled to hold the property for 20 days and not be paid for it, but the Legislature has made no provision for it, and I cannot do so. Possibly the fact that no such provision has been made by the Legislature may be a casus omissus. I may add that I am of opinion that what the Legislature intended by the words "the amount actually due thereon" in sec. 7 of the Ordinance, ch. 44, means the amount actually due on the security, and it is not intended to include any such charges as are suggested by the learned counsel for Winters.

As before stated, I hold the seizure made by Winters to be an extra-judicial seizure, and therefore within sec. 2 of ch. 34. That section provides that "no person whomsoever making any seizure under the authority of any chattel mortgage, bill of sale, or any other extra-judicial process," shall charge more for services than the fees therein specified. The section no doubt is somewhat badly expressed. A lien note is not what I would call an extra-judicial process under the strict meaning of the word "process," but it will be observed that the words used are "any other extra-judicial process;" and a lien note is just as much a judicial process as a chattel mortgage or a bill of sale. Evidently the Legislature has seen fit in this section to designate chattel mortgages and bills of sale as judicial processes, and the words "other extra-judicial processes" are intended to embrace any other security under which personal property may be seized, except processes of the Courts. The right to fees and charges for seizures under chattel mortgages has been considered by me in three cases, namely, McNaughton v. Hamilton, decided on 23rd June, 1893, Hamilton v. Hutchings, decided on 4th July, 1894, and Lynes v. Machel, decided on 2nd July, 1895; and I held that no more or other fees and charges could be enforced for such seizure than those prescribed by the Ordinance then in force, Revised Ordinances ch. 42, which is exactly the same as ch. 34 of the Consolidated Ordinances. My reasons for reaching such conclusion are fully set out in these judgments, especially in McNaughton v. Hamilton. I am still of the same opinion. The only amount, therefore, that Winters had a right to claim with respect to the seizure of these horses is $1 for the seizure. None of the other ser-

Digitized by Google

vices provided for by the schedule to the Ordinance ch. 34, were performed. I am of opinion that the $1.50 per day for man in possession is intended to cover possession by a man other than the lien-holder or mortgagee. It seems to me that that must be so, in view of what was laid down in Somes v. British Empire Shipping Co. The amount of the principal and interest due upon this note at the time of the tender hereinbefore mentioned was $141.60; to this add $1 for the seizure, which makes the amount then coming to Winters $142.60. Plaintiffs were entitled to redeem the property and have it delivered to them on payment of that amount, and they tendered more, and therefore Winters ought to have given up the property to them.

Decree: that upon plaintiffs paying into Court to the credit of this cause the sum of $142.60, defendant Winters deliver to plaintiffs or their agent possession of the horses in question; and that defendant Winters pay to plaintiffs their costs of this action, to be taxed.

---

## NORTH-WEST TERRITORIES.

### (WESTERN ASSINIBOIA.)

NEWLANDS, J. MARCH 25TH, 1905.

TRIAL.

### MASSEY-HARRIS CO. v. LOWE.

*Collateral Security — Enforcement — Bar — Notes Given for Price of Machinery — Retaking and Selling Machinery under Conditional Sale Agreement—Chattel Mortgages Collateral to Notes—Effect on.*

Action on two chattel mortgages given by defendant to plaintiffs, to recover a balance due thereon amounting to $487.45.

W. B. Willoughby, Moosejaw, for plaintiffs.

T. C. Johnston, Regina, and W. Grayson, Moosejaw, for defendant.

NEWLANDS, J.:—These chattel mortgages were given as collateral to three promissory notes which were given for a mower and rake and a press drill sold by plaintiffs to defend-



Digitized by Google

ant on the conditions that the title, ownership, and right to the possession of the property for which the notes were given, should remain in Massey & Co. Limited (who afterwards assigned to plaintiffs), until the notes or any renewal thereof should be fully paid, with interest, and if default were made in payment of this or any other note in their favour, or should the defendant sell or dispose of or mortgage his landed property, or if for any good reason Massey & Co. should consider the note insecure, they were to have power to declare it and all other notes made by defendant in their favour due and payable at any time, and take possession of the property and hold it until the note should be paid, or sell the property at public or private sale, the proceeds thereof to be applied upon the amount unpaid of the purchase price.

Under this condition plaintiffs took possession of the property mentioned therein, sold the same, and applied the receipts upon the notes, and now seek to recover the balance due upon the mortgage given as collateral security.

There being no proviso in the notes that plaintiffs can, after a sale of the property for which they were given, recover the balance due from defendant, I am of the opinion that by the resale the original agreement was put an end to, and that, as plaintiffs have no right to recover on the notes, they have no right of action on the collateral security given for the payment of these notes: Sawyer v. Pringle, 18 A. R. 218; Arnold v. Playter, 22 O. R. 608.

It is contended by plaintiffs that in the mortgages given as collateral security there is a provision that plaintiffs may take possession of the property for which the notes were given and sell the same, apply the proceeds on the amount due, and sue for the balance, and that they are entitled to recover in this action under that provision: but I am convinced, on a careful study of that provision in the mortgage, that it does not apply to the machinery sold by plaintiffs to defendant for which the notes were given, but only to the chattels mentioned in the mortgages, viz., the grain sown by defendant on his farm.

Other defences were raised by defendant at the trial, but it is unnecessary for me to consider them, as under the above, I think, judgment should be entered for him.

Judgment for defendant with costs.

Digitized by Google

## NORTH-WEST TERRITORIES.

### (WESTERN ASSINIBOIA.)

NEWLANDS, J. MARCH 27TH, 1905.

TRIAL.

## MASSEY-HARRIS CO. v. MOORE.

*Execution—Seizure of Crops Grown on Land Transferred by Execution Debtor — Labour and Means of Transferee—Ownership of Crops—Interpleader.*

An interpleader issue.

D. J. Thom, Regina, for execution creditors.

W. M. Martin, Regina, for claimant and sheriff.

NEWLANDS, J.:—Under an execution issued in the above suit, the sheriff seized a certain quantity of grain grown on the north-east and south-east quarters of a section, which W. H. Moore, the son of the defendant, claims as his property.

The north-east quarter was defendant's homestead, and he transferred it to the claimant on 4th December, 1903. The south-east quarter belonged to the wife of defendant, and was leased by her to the claimant orally for the season of 1904.

The evidence shews that the claimant purchased the seed grain, hired and paid for the help, and paid for the twine and harvesting. Defendant did a small amount of work on the farm, but not sufficient, in my opinion, to affect the ownership of the crop.

In Kilbride v. Cameron, 17 C. P. 373, it was said by A. Wilson, J., in a case similar to the present: "The question of bona fides between the father and son . . . as to the land does not very materially enter into the merits or subject of this suit; because it might be conceded for the purposes of this inquiry that these transactions as to the land were not valid as against the creditors of the father, and yet that admission would by no means determine the right of property to the crops in question. The evidence shews that the father did not raise the crops, or furnish the means for doing so; the labour and means were contributed by the son alone. Unless, therefore, it were to be held that when the

Digitized by Google

land was fraudulently transferred, the crops which were raised upon it by and at the sole expense of the fraudulent vendee, could be seized as the goods and chattels of the vendor, I should not be able to say that the property in dispute was the property of the execution debtor and was liable to be taken for his debts. . . . The crops, I think, were upon this evidence the sole property of the plaintiff in this case as against the execution creditor."

This decision disposes of the question of the ownership of the crops raised on the north-east quarter, which was transferred by defendant to W. H. Moore, as I think that the evidence shews that the claimant alone contributed the labour and means for raising the same.

As to the crop raised on the south-east quarter, this section was never the property of defendant, and I think he had authority to lease it to the claimant as the agent of his wife, and, as the claimant also contributed the labour and means for raising the crop on this quarter section, I think that the grain raised on it, as well as on the north-east quarter, is the sole property of the claimant as against the execution creditors.

Execution creditors to pay the costs of this interpleader.

---

## NORTH-WEST TERRITORIES.

### (WESTERN ASSINIBOIA.)

NEWLANDS, J. MARCH 28TH, 1905.

TRIAL.

### HARROD v. WATT.

*Landlord and Tenant--Action for Rent—Defences—Eviction —Entry by Landlord to Protect Property—Demised Premises Becoming Uninhabitable.*

Action for rent. Defendant pleaded eviction, and also that during the tenancy the premises became uninhabitable because of flood.

E. C. Emery, Edmonton, for plaintiff.

T. C. Johnston, Regina, and A. Ross, Regina, for defendant.

Digitized by Google

NEWLANDS, J.:—As to the eviction, the evidence shews that defendant sublet the premises, and that the lessee some time during the month of May, 1904, abandoned the premises without notice to the lessor, leaving them open to the public Then about 1st June plaintiff went on the premises for the purpose of cleaning them up, after receiving notice from the mayor of the town to that effect, and for the purpose of protecting the premises he got a key made and locked up the house, and when defendant subsequently came out for the purpose of putting in another tenant, he unlocked the premises, relocking them when defendant left. Plaintiff kept the key, but was always waiting to hand it over to defendant.

In the circumstances I cannot hold that there was an eviction, as plaintiff did not enter for the purpose of putting an end to the tenancy, but only to protect the property. The case Newby v. Sharp, 8 Ch. D. 39, is almost identical. Thesiger, L.J., at p. 51, said: "In considering whether there is an eviction, you must look not merely to the circumstances of the case and the intention with which the entry was made. Here it is plain, 1st, that the landlord's entry was not intended to put an end to the tenancy, 2nd, that it was merely temporary, 3rd, that it was merely to meet an emergency, which put the plaintiff in danger of criminal proceedings and penalties."

I will only refer to one other case, Oastler v. Henderson, 2 Q. B. D. 577, a much stronger case than the present, where it was also held there was no eviction.

As to the premises being uninhabitable during the term, Mr. Johnstone, for defendant, cited Wilson v. Finch Hatton, 2 Ex. D. 336. This was, however, a case of a furnished house, and the law is quite different from that applicable to the present case. Pollock, B., in giving his judgment said: "If this were the case of an agreement for the letting of real property, the well established rules of law would apply, and they would force us to hold that the tenant could not succeed in this case."

In Hart v. Windsor, 12 M. & W. 68, Parke, B., in delivering the judgment of the Court, said: "It appears therefore to us, to be clear upon the old authorities, that there is no implied warranty on a lease of a house or of land that it is or shall be reasonably fit for habitation or cultivation. It is much better to leave the parties in every case to protect their interests themselves, by proper stipulation, and if they really mean a lease to be void by reason of any unfitness in the

Digitized by Google

subject for the purpose intended they should express that meaning." And in Denison v. Nation, 21 U. C. R. 57, where the house became unfit for habitation in consequence of the roof admitting water and for want of sufficient drainage, Robinson, C.J., said: "The law is now fully settled by the case of Hart v. Windsor, that the fact of premises demised having become unfit for occupation by reason of want of repair or from defective drainage or from a nuisance existing on the premises, will not exempt the tenant from payment of rent if from any such cause he shall quit possession of the premises."

Therefore I give judgment for plaintiff with costs.

---

## NORTH-WEST TERRITORIES.

### (EASTERN ASSINIBOIA.)

WETMORE, J. MARCH 30TH, 1905.

TRIAL.

### COLWILL v. JOHNSON.

*Malicious Prosecution—Information for Theft—Acquittal of Plaintiff — Want of Reasonable and Probable Cause—Malice—Damages.*

Action for malicious prosecution and false arrest.

J. T. Brown, Moosomin, for plaintiff.

E. L. Elwood, Moosomin, and Levi Thomson, Wolseley, for defendant.

WETMORE, J.:—This is an action for malicious prosecution. The first paragraph of the statement of claim also contains a charge for arresting the plaintiff falsely and without lawful justification or excuse. No malice is charged in this paragraph. Nothing, however, turns upon it, because if plaintiff cannot succeed on the claim for malicious prosecution he cannot succeed upon the other claim. I will treat this therefore as an action for malicious prosecution.

Upon the 28th September, 1903, plaintiff and defendant met at Wolseley, and negotiations took place between them with a view of trading horses. It is conceded that the negotiations so far proceeded as to arrive at the basis of the trade. Plaintiff was in possession of a pair of ponies, and

Digitized by Google

defendant had a team of horses, and a proposition was made that plaintiff would give defendant the ponies, a cutter, and $175 for the horses, to which defendant practically assented. They proceeded to an hotel in Wolseley, and plaintiff prepared and signed a promissory note in favour of defendant for $175, payable three months after date, and tendered this note to defendant, who took it away with him. Plaintiff testified in effect that the delivery of this note and the reception of it by defendant was a closing of the bargain. He testified that he asked defendant if he was particular about the cash, if he wanted it down, and that defendant replied that he was not particular, and that if he, plaintiff, did not want to pay the cash he was satisfied to take his note for the $175, and that they then and there in the hotel so agreed on the deal. Defendant, however, testified, to the effect that he did not agree to take plaintiff's note. He testified that plaintiff said to him: "In case we make a deal and I haven't got the money, would you take a note for a month for the balance?" and that he replied that he would if it was a good note; that plaintiff and he thereupon went to the hotel, and plaintiff wrote out the note and handed it to him, saying, "How would this do you?" and he replied that he would let him know in a few minutes; that he thereupon went to the Union Bank and made inquiry of the manager of that institution as to the soundness of the note, and on representations made by him refused to continue to hold it, and tendered it back to plaintiff, who refused to accept it. There is no doubt that after defendant received the note from plaintiff he did go to the manager of the Union Bank and made inquiry of him, and after such inquiry tendered the note back to plaintiff. But plaintiff swore that before this was done, and before he and defendant separated, they went to the bar of the hotel, and that defendant there admitted in the presence of the barkeeper, one Leadbetter, that he and plaintiff had traded horses; and that they proceeded from there up the street a short distance, when defendant, stating that he had forgotten some parcels which he had left at the hotel, went back to get them, and then left plaintiff, and shortly afterwards returned and tendered back the note as before stated. It is clear that plaintiff refused to accept the note back, and insisted that a change of property had been effected. It was not questioned that, if plaintiff's version of this transaction is correct, the team of horses passed to plaintiff. Defendant, however, refused to allow plaintiff to take possession of the horses, and took them away to his home some distance from Wolseley. On 5th October following, defendant came into Wolseley with

Digitized by Google

these horses and left them tied on the street there, when plaintiff, somewhere between 9 and 10 o'clock in the evening, unhitched them from the waggon, took the harness off them, and took them away. Defendant thereupon proceeded to Mr. A. D. Ferguson, a justice of the peace, and the result was that an information was laid against plaintiff for stealing the horses, and a warrant was issued upon such information, and plaintiff was arrested thereunder. He was taken to the gaol in the court house at Wolseley that same evening, somewhere about 10 o'clock, locked up, and confined there until about 12 o'clock the next day. The preliminary investigation was held upon the charge before Mr. Ferguson and another justice, which resulted in plaintiff being committed for trial in the Supreme Court, and he was tried before me on 22nd and 23rd October, 1903, and acquitted. Defendant testified in effect that he was drunk at the time he went to Mr. Ferguson's, and that his intention was merely to apply for a search warrant, and that such were his instructions to the justice, and that he had not intended to lay an information against plaintiff for stealing. Before the information was laid, however, the justice gave him a blank form of information and instructed him to go to Mr. Thomson, the then Crown prosecutor, who wrote out the information which the defendant swore to. Mr. Thomson attended at the preliminary investigation, but he is unable to state whether he so attended as counsel for the defendant or in his capacity as Crown prosecutor. It is quite clear that in drawing out the information he was acting as the agent of the justice, and not as solicitor for defendant. Plaintiff having been committed for trial, the charge in the Supreme Court was laid by Mr. Thomson as Crown prosecutor, but it was so laid by reason of the testimony that defendant had given at the preliminary examination. Defendant testified at the trial in the Supreme Court, as well as at the preliminary examination.

Upon the points of difference above referred to, I find as a matter of fact that defendant did accept the note as being satisfied with it, and did not take it for the purpose of ascertaining whether it was a good note or not, or to find out whether plaintiff was a responsible person. It seems to me incomprehensible, and it would not be in accordance with the usual practice, that plaintiff should give defendant a note for the purpose of his ascertaining anything of the sort he alleges. He could have found out all about the solvency of this man, or his ability to pay, without taking a note with him; and I think it is quite unlikely that plaintiff would have given defendant a note to carry about for any such purpose.

Digitized by Google

Moreover, defendant has given me grave cause to doubt his credibility in testifying as he did, that he did not want plaintiff arrested, and that the only request he made of the justice was for a search warrant. The evidence is overwhelming the other way. The testimony of Mr. Ferguson and of the witnesses Elliott and Biden put it beyond all question that he started for the justice for the purpose of laying an information and getting the man arrested, and that he laid the information for the purpose of charging plaintiff with theft, and when he was arrested boasted about it, and exulted in the fact that he had brought it about. Moreover, the information was in the handwriting of Mr. Thomson, a professional gentleman of integrity and honour, and I am satisfied he would not have drawn the information for theft as he did if defendant had not wanted such information so drawn. I therefore find as a matter of fact that defendant deliberately laid the information for the purpose of charging plaintiff with theft, and of obtaining a warrant thereupon to have him arrested. I also find as a matter of fact that defendant was aware that the deal with plaintiff had been closed by his taking the note, that his going to the bank manager to make inquiry was an after-thought, and that his subsequently setting up that he only took the note for the purpose of ascertaining whether it was a good one, is a pretence.

The question now arises: Was there a want of reasonable and probable cause for laying this information? In Powell v. Hiltgen, tried before me, and reported in 5 Terr. L. R. 17, I stated at p. 21, that "in considering the facts as affecting the question of reasonable and probable cause and my holdings upon my findings, I have been largely influenced by what is laid down in Hicks v. Faulkner, 51 L. J. Q. B. 268." In that case, Hawkins, J., at p. 271, is reported as follows: "I should find reasonable and probable cause to be an honest belief in the guilt of the accused, based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed. There must be, first, an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based upon an honest conviction of the existence of the circumstances which led the accuser to that conclusion; thirdly, such secondly mentioned belief must be based upon reasonable grounds—by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; fourthly, the

Digitized by Google

circumstances so believed and relied on by the accuser must be such as amount to a reasonable ground for belief in the guilt of the accused."

In the first place, I find that defendant did not honestly believe in the guilt of plaintiff when he laid the information in question. That finding would probably be sufficient to dispose of the question of want of reasonable and probable cause, but I may say further that if I could come to the conclusion that he honestly believed in the guilt of plaintiff when he laid the information, such belief was not based upon "such grounds as would lead any fairly cautious man in the defendant's situation so to believe." He was aware that he accepted the promissory note from plaintiff, and so concluded the trade between them, and that fact would or ought to have been sufficient to lead a fairly cautious man in defendant's situation to believe that he had no ground for prosecuting plaintiff for theft. I feel, moreover, that defendant must have been aware of the fact that he had no good grounds for prosecuting plaintiff, because, if he had, he would not have found it necessary to make up the story which he has testified to at the trial, that he never intended to lay an information against plaintiff for theft. I therefore find that the prosecution was laid against plaintiff without reasonable and probable cause.

It was urged, however, that defendant was not responsible for the proceedings subsequent to the laying of the information, because plaintiff was committed for trial by order of the justices holding the preliminary examination, and the charge was preferred and pressed in the Supreme Court by the Crown prosecutor. Now, I am of opinion that as a rule a person who lays an information without reasonable and probable cause, and maliciously, has got to take the consequences of all that follows in consequence of laying that information. In Dubois v. Keats, 9 L. J. Q. B. 66, the declaration stated that "the defendant falsely and maliciously and without reasonable or probable cause indicted and caused and procured to be indicted the plaintiff, and falsely and maliciously prosecuted the indictment." The facts were that the defendant had gone before a magistrate and given information upon which a warrant was granted for the apprehension of the plaintiff upon a charge of stealing. At the close of the hearing before the magistrate, the plaintiff was admitted to bail, and the defendant was bound in a recognizance to appear and prosecute the charge at the next session of the Criminal Court, which he accordingly did, and the plaintiff was acquitted. Objection was taken that, inasmuch as the charge

Digitized by Google

of malicious prosecution was for "causing and procuring the plaintiff to be indicted," and the defendant having been under recognizance to appear and prosecute at the Court where the indictment was laid, the proceeding was in consequence of the act of the magistrate, in binding him to appear and prosecute. But the Court held, in the circumstances, that the defendant was liable, that it was open to the jury to go behind the proceedings and to inquire as to how the charge came to be originally laid. Denmann, C.J., in delivering his judgment is reported on p. 68 as follows: "I must say that it appears to me that the mere fact of his having been compelled to enter into a recognizance can in no case operate, as is now contended, where the Court and jury are satisfied that malice was the original cause for preferring the complaint, and the recognizance was only the natural consequence of such false and malicious charge." So, here, the fact that the justices committed plaintiff for trial, and that the Crown prosecutor proceeded with the trial, cannot operate to help defendant, in view of the fact that these acts of those officers "were the natural consequence of the false and malicious charge."

It was also urged that defendant, having acted on the advice of counsel, was not liable to be mulcted in this action. Defendant did not act on the advice of counsel in laying the information at all; there is no evidence to establish that fact. And so far, as the subsequent proceedings were concerned, namely, at the trial, although he did act on the advice of counsel, it was the advice of the Crown prosecutor, the counsel for the Crown, who was influenced by the defendant's statements in the testimony given at the preliminary trial, which were false, as I have found. In such circumstances the defendant cannot screen himself behind the advice of counsel.

As to malice: I find actual malice in this case. In the first place, the fact that there was want of reasonable and probable cause in laying the information and in proceeding therewith, in the circumstances which I have dealt with, affords some grounds for coming to the conclusion that the prosecution was instituted maliciously; but in his examination for discovery defendant testified in answer to the following questions:

"Q.—Did you want this charge pressed against Mr. Colwill? A.—All I wanted was to get my horses back, that was my only object.

"Q.—You are sure of that? A.—I am quite sure.

"Q.—Never had any other object? A.—No, never.

Digitized by Google

"Q.—On your oath do you say you never had any other object but to get your horses back? A.—Yes, on my oath, I say that.

"Q.—And when you laid that information that night that was your only object? A.—Yes, or at any time.

"Q.—That was your only object when you pressed the charge? A.—Yes, to get my horses."

It is clear from this testimony that defendant laid the information not to vindicate the law of the country with respect to criminal offences, but for an ulterior object, namely, to obtain the horses, and I would gather from what he testified further on at the same examination that he did so because he thought it was a cheaper method to him of recovering the property.

As to the damages: There is no evidence to establish that plaintiff had counsel retained to defend him at any time, either at the preliminary hearing or at the trial. There is some evidence to establish that he had counsel employed with respect to some matters that transpired after the trial was over, but that does not affect this question. Plaintiff therefore cannot recover his costs as the special damages alleged in the statement of claim "For costs of Mr. Richardson." The fact that defendant in his pleadings has not contradicted the fact that plaintiff was rendered liable for these costs must come under Order 21, Rule 4, of the English Rules, whereby it is provided that the question of damages is always in issue unless expressly admitted. The plaintiff is entitled to recover for loss of time, although the amount has been left entirely to me, as no evidence has been produced upon that matter. I am not disposed to grant very heavy damages in this case because I am of opinion that plaintiff has not come before me with very clean hands. At the time that the exchange in question was made, the ponies that he let defendant have were bound under a lien note to one Allen, and I am satisfied that plaintiff never informed defendant of that fact. I think his course in that respect was dishonest, and I think he tricked defendant into consummating the bargain in a way that is not creditable to him. I shall therefore award no more damages than $100, which also covers loss of time.

There will therefore be judgment for plaintiff for $100 damages and costs to be taxed on the lower scale; and I order that no costs be taxed or allowed to defendant under item 95 of the tariff.

Digitized by Google

THE

# Western Law Reporter

VOL. I. TORONTO, APRIL 15, 1905. No. 6.

## NORTH-WEST TERRITORIES.

### (EASTERN ASSINIBOIA.)

WETMORE, J. MARCH 28TH, 1905.

CHAMBERS.

### RE ATTORNEY-GENERAL FOR NORTH-WEST TERRITORIES AND CANADA SETTLERS LOAN AND TRUST CO.

*Assessment and Taxes—School Taxes—Returns of Treasurers of School Districts—Confirmation—Unoccupied and Unpatented Lands — Homestead Holdings — Liens of Loan Company—Constructive Occupancy.*

Application by the Attorney-General under sec. 20 of the School Assessment Ordinance to confirm the returns of various treasurers of school districts.

A. K. Macdonald, Regina, for the applicant.

E. L. Elwood, for the company.

WETMORE, J.:—Application was made to me, under sec. 20 of the School Assessment Ordinance, to confirm the returns of various treasurers of school districts, and among them of



Digitized by Google

the Landshut R. C. school district, No. 30, and of the Logberg school district, No. 206. The taxes in arrear so far as the Landshut district is concerned were for the years 1898 to 1901, both inclusive, and as regards the Logberg school district from 1892 to 1900, both inclusive. The following were the admitted facts in respect to the matters in question:—

During the years the assessments were made, the lands were held by homesteaders under the Dominion Lands Act. Patents for these lands did not issue until some time after the years in which these assessments were made. And during these years the Canada Settlers Loan and Trust Co. had liens on such lands under the provisions of the Dominion Lands Act. The company subsequently acquired a title to these lands, and are now the registered owners. The company were never in actual occupation of these lands. And the homesteader was not during any of the years of the assessment in question in occupation of such lands. As respects the Landshut district the company were not assessed.

Mr. A. K. Macdonald appeared for the Attorney-General, and was instructed that "it is not considered advisable to press for the confirmation of the returns as to the lands of the company."

The application will therefore quoad the lands in question be refused. No witnesses were examined in connection with the application on the part of the company. Mr. Macdonald, however, suggested for my consideration that the company were occupants of the land in question by virtue of their lien, and would in a suit for the amount be liable by virtue of such constructive occupancy. I do not feel warranted in expressing any opinion upon that question at present. The application was to confirm the treasurers' returns, and that was done with a view to vest the title to the lands in the Crown for the public use of the Territories, or, in other words, it was in the nature of a proceeding in rem against the lands as being subject to and bound by the assessment, and the taxes imposed by virtue thereof.

Any expression of opinion by me as to the personal liability of the company would be in a matter coram non judice. That question, if the opinion of the Courts is desired, would have to be raised by action as provided for in the Ordinance.

Digitized by Google

## MANITOBA.

DUBUC, C.J. APRIL 5TH, 1905.

TRIAL.

## SMITH v. GALBRAITH.

*Promissory Note—Holder in Due Course—Defect in Title—Onus—Indorsement after Maturity—Equities — Payment on Account.*

Action on a promissory note made by defendant in favour of the John Abell Engine and Machine Works Co., on 19th September, 1898, payable 20th November of the same year, and indorsed to plaintiff without recourse. Defendant admitted the making of the note, but stated that it was given with other notes for a threshing outfit; that the outfit was afterwards returned to the company; and that, as was understood between himself and the company, they promised to return his notes. He alleged that plaintiff became the holder of the note after it became due, and never gave value or consideration for it.

Plaintiff shewed that he had made the sale of the outfit as agent of the company; that the price agreed upon was $3,000; and that he took the notes of the defendant in payment therefor; he swore that this particular note of $300 was taken for his commission of 10 per cent. on the sale; that it was taken, as the others were, in favour of the company, but that it was indorsed to him by the company as payment of his commission, and this he alleged was the mode adopted by the company to pay commission to their agents.

As to whether the note was indorsed to him before maturity he stated that after receiving the notes, he sent them to the company, and that afterwards the company returned this one to him indorsed as it then was. He stated that he generally made his settlement with the company at the beginning of November, as his year's service ended on 1st November, and that it must have been on making his yearly settlement with the company in the first week of November, 1898, that the note was indorsed and given to him; but, as a matter of fact, he did not remember and could not

Digitized by Google

swear positively that this note was actually indorsed to him before it became due.

J. F. Kilgour, for plaintiff.

S. H. McKay, for defendant.

DUBUC, C.J.:—It is laid down as a general proposition that possession of a negotiable bill or note is prima facie evidence of title, and the holder of such an instrument is presumed to have taken it in good faith for value before maturity, in the usual course of business and without notice: Byles on Bills, p. 177; Am. & Eng. Encyc. of Law, vol. 4, p. 318; Parkin v. Moon, 7 C. & P. 408; Lewis v. Parker, 4 A. & E. 838.

Such being the case, it devolved on defendant to shew that plaintiff was not the lawful holder in due course; and he tried to do it by giving evidence that plaintiff knew that the machine he had bought from the company was not working satisfactorily, and that, on that account, defendant was not bound to pay the notes; and in support of that contention Frey v. Ives, 8 Times L. R. 582, was cited. Lopes, L.J., held in that case that if facts come to the knowledge of the holder which are such as to raise a suspicion in his mind that there is some defect in the title to the bill, and he makes no further inquiry, he cannot recover upon it.

In this case defendant saw plaintiff between 10 days and 3 weeks after he had started working with the machine, but the evidence does not shew that he intimated at the time that he would not keep the machine. He kept working with it until about the middle of November. It was not until June or July of the following year that the company took the outfit back. The separator was resold, and the proceeds of the resale were credited by the company to defendant. The engine was taken to the company's warehouse, and it does not appear what has been done with it. As to the return of the notes, there is only defendant's statement that the company agreed to return them.

Some correspondence took place in November and December, 1904, about the notes between defendant's solicitor and the head office of the company in Toronto. The solicitor asked for the return of the notes. The company's letter in reply states that the balance of the company's claim against defendant was $409.37, and that if the defendant pays this

Digitized by Google

amount his notes will be returned to him. Defendant states that he has not been sued on any of the notes kept by the company.

When, as plaintiff says, he received the note sued on about the first week in November, 1898, he had no reason to suspect that the bargain would be rescinded or that the outfit would be re-possessed by the company; he must have received it in good faith in payment of his commission. There is, no doubt, the legal point whether the note was indorsed to plaintiff before or after it became due; but as to the equities of defendant against the company it appears from the evidence that the company have still against him a claim of $409.37 on the notes given by him.

Notwithstanding that plaintiff could not swear positively whether the note was indorsed to him before maturity, I think that, in view of all the circumstances of the case, the presumption is that it was so indorsed before it became due. He had made the sale and earned his commission and was entitled to the amount. There is evidence that defendant paid $50 to plaintiff on the notes given for the machine. Plaintiff seemed not to remember receiving that sum from defendant, and said he had no record of it, but did not deny that it was paid to him, and if he received it he was not sure whether he remitted it to the company or kept it. On the evidence I must find that he received the sum and that it should be credited on the note sued on. There should be judgment for plaintiff for the amount of the note, less $50, with interest and costs.

---

## MANITOBA.

DUBUC, C.J. APRIL 5TH, 1905.

TRIAL.

### McILVRIDE v. MILLS.

*Vendor and Purchaser—Sale of Land—Action by Vendor for Specific Performance — Contract — Statute of Frauds — Letters—Unsigned Agreement — Authority of Agent—Misrepresentations of Vendor—Tender of Conveyance—Waiver of Right to Specific Performance—Amendment.*

Action to recover a balance of purchase money on the sale by plaintiff to the defendant of a farm.

Digitized by Google

Defendant denied the purchase of the lands, alleged that there was no memorandum in writing to satisfy the Statute of Frauds, and that, if there was any such agreement as was alleged by plaintiff, it was induced by the fraudulent misrepresentation of plaintiff as to the quality of the lands, and, in the alternative, that if any such agreement or sale was made, the same was entered into in consequence of a mistake of fact.

On 28th September, 1904, defendant, in company with George Halliday, a clerk in a dry goods store at Brandon, went to plaintiff's farm for the purpose of examining it with a view to purchase the same. Plaintiff walked with them over the four quarter sections of the farm, pointed out the boundaries thereof and shewed them the worst portions as well as the best. He asked $16 an acre for the land.

On the evening of the same day, defendant met in Brandon William Henderson, sheriff of the Western Judicial District, and talked to him of plaintiff's farm. He asked Henderson what he thought it was worth. Henderson said he knew only the east portion of it, and that the other part was bluffy; but if the farm could be bought for $15 or $16 an acre, that would be a good bargain. Defendant then told him he had been up that day and had seen the farm; he said that plaintiff asked $16 an acre for it. Henderson said he thought it could be bought for $15 an acre, and he felt satisfied he could buy it at that price, as he had heard plaintiff about a month previously tell another man that he would sell it for $15 an acre. He told defendant also that he thought there was a mortgage on the land, and he would have to assume it. Defendant told Henderson that if he could buy the farm for that money he would take it. Henderson swore that defendant told him that if he could buy the farm for $15 an acre he might close the bargain. He said he would pay all the cash plaintiff would want and would assume the mortgage. Henderson stated that when defendant was leaving, he said to him: "If you can buy this farm at once, buy it, and you can draw on me for the cash deposit." Henderson told him he would himself pay the cash deposit and would notify him at once as to the terms and conditions. Defendant said that would be satisfactory.

About the 2nd or 3rd October Henderson received from defendant the following letter:—

"Have you seen that man about that land, McIlvain? If so, please let me know at once the particulars; if I am going

Digitized by Google

to do anything with it this fall, I must know at once, or set myself for something else here; will pay you for any trouble you go to; answer by wire or mail as you see fit; if he will sell, please find out when he will give possession, as I would like to move at once." The letter was headed "Arcola."

On receiving the letter Henderson saw plaintiff, purchased the lands from him for defendant at $15 per acre; took plaintiff to his (Henderson's) own solicitors, Messrs. Coldwell & Coleman, had an agreement for sale prepared, which was dated 6th October, 1904, and was signed by plaintiff, and he gave to plaintiff his own cheque for $100 as deposit on the purchase. The cheque bore the same date as the agreement, 6th October, 1904.

On the same day he sent to defendant the following telegram: "Have bought McIlvride's farm to-day, paid deposit of 100. He will give possession at once; 15 per acre." He also wrote to defendant a letter which defendant stated he had lost. In such letter he told him he had purchased the farm at $15 an acre, stating the terms; that he had an agreement signed by plaintiff and that he would give possession at once. On receiving the telegram, defendant wrote to Henderson as follows:—"You will think it strange of me in not answering your telegram sooner. I only got it on Saturday the 8th; was away, but trust it will be all right. Thanks for your kindness. I would like if I could ship my stuff before going down and then get things fixed up, as the time is so short; if a lawyer would go on and make a search, or if you would attend to it, I would pay you for your trouble and send you what money you require any time; could it be done it would help me out; I hope I am not putting you to too much trouble, but I hope to do something for you again. Does McIlvain know who is buying his farm? That other fellow Halliday in Nation Shewan's will be disappointed; he said he had no interest in the sale, but was only doing it to help Mr. McIlvain as a friend, but I notice he was very anxious, as he wrote me twice saying if I did not take it he had a friend from the East who would. His price was $16 per acre. I think it is a very good deal; I don't know, but it looks good; I may be mistaken. Advise me of terms, and if it can be arranged before I move down. You can tell McIlvain I will move into his house as soon as possible." He wrote "McIlvain," but it was shewn that he meant the plaintiff.

Digitized by Google

It appeared that defendant had not yet received Henderson's letter of 6th October when he wrote the one last above recited.

About that time defendant sent or caused to be sent to Henderson the sum of $100 to repay him for the deposit he made on the purchase. Things remained in that shape until 17th October, when defendant wrote to Henderson the following letter:—"You advise McIlvain that I have found it impossible through delays in collecting money and getting things straightened up to take possession in time to prepare ground this fall; also, things sometimes turn out for the best; as I told you, I did not see or go over the west side of that place but intended doing so before paying money. I was really sorry you paid $100 without advice; however, you done the best you could; I am now advised that the west side which McIlvain said was as good as what we saw is all sloughs and not fit for cultivation; I have it right; if you think I have been misinformed take a look some time you are out; and the sloughs are all moss, pure muskeg, and contain water always; so I will take no chance in shipping a car of effects. I will forfeit that $100 and pull up somewhere else. Sorry it has turned out wrong, but it can't be helped. McIlvain wants to shew the worst as well as the best next time. I am advised that the west is not worth more than $2 per acre. Thanking you for your trouble, I remain," &c.

After seeing this letter and satisfying himself that the defendant refused to carry out his part of the agreement, the plaintiff filed his statement of claim.

G. R. Coldwell, K.C., for plaintiff.

J. F. Kilgour, for defendant.

DUBUC, C.J.:—The first point to be determined is, whether there was a memorandum in writing sufficient to satisfy the Statute of Frauds. Henderson had no authorization in writing to purchase the lands for the defendant, but it appears that this was not necessary. Sugden on Vendors and Purchasers, p. 145, says: "An agent may be authorized by parol to treat for, or buy, or sell an estate, although the contract itself must be in writing." See also Dart on Vendor and Purchaser, p. 210.

In Coles v. Trecothick, 9 Ves. 234, the Lord Chancellor said, "It is clearly settled now that an agent need not be authorized in writing."

Digitized by Google

Was Henderson authorized by defendant to purchase the lands for him? Defendant states that what he told Henderson was that if the west half was as good as the east half, he might go on and purchase it for him, but Henderson swears positively that defendant never told him anything of the kind; but that defendant, after stating that he had gone to see the farm, told him that, if he could get it for $15 per acre, to close the bargain. After hearing both defendant and Henderson as witnesses, and after reading the first two letters written to Henderson by defendant, in which he seems anxious to get the property without any mention of the difference between the east and west halves, I cannot hesitate to believe Henderson's statement against that of defendant.

I have now to consider whether what was written in connection with the transaction, by the defendant, by Henderson as his agent, and the agreement prepared under Henderson's instructions, are sufficient to constitute such a memorandum in writing as to satisfy the Statute of Frauds.

First in point of time is the first letter of defendant to Henderson, then the agreement for sale prepared under the instructions of Henderson as agent, then Henderson's cheque for $100, then Henderson's telegram and letter to defendant, and lastly defendant's second letter to Henderson. In defendant's letters the land is not described, nor are the terms of the purchase mentioned.

Henderson's cheque is not explicit enough by itself, nor is his telegram. But in his letter written the same day as the telegram, Henderson says he gave the terms of the transaction, without stating, however, that the land was otherwise described than as McIlvride's farm. The agreement of 6th October contains the names of the parties, the description of the lands, the price, the $100 deposit as cash payment, the amount due on the mortgage to be assumed by the purchaser and the balance—left in blank—on the day of Oct. 1904. The balance is left in blank, but can be easily ascertained from the amount of the purchase price, which is stated as $9,600. The agreement is signed by plaintiff as vendor. It is not signed by the defendant, but his name appears in it as one of the parties to the agreement, and must be held to have been inserted there by his agent or under the said agent's instructions. Can that, read and taken in connection with the other documents above referred to, be considered such as to constitute a sufficient memorandum in writing to take the case out of the statute?

Digitized by Google

In McMillan v. Bentley, 16 Gr. 387, the owner of land gave authority to an agent to sell; the agent accordingly entered into a parol contract for the sale, and communicated the fact and particulars of the contract to his principal; this was held a sufficient note or memorandum in writing to satisfy the Statute of Frauds. (See also Evans v. Hoare, [1892] 1 Q. B. 593; Schneider v. Norris, 2 M. & S. 286; Saunderson v. Jackson, 2 B. & P. 238; Johnson v. Dodgson, 2 M. & W. 653; Knight v. Crockford, 1 Esp. 190.)

In the present case the two letters of defendant and the telegram of Henderson, taken alone, do not contain a complete description of the land and the full terms of purchase, although under Bleakley v. Smith, 11 Sim. 150, the memorandum describing the land as the "property in Cable street," when it was shewn that the vendor had no other property in Cable street, was held sufficient. But the terms of the contract were fully given in the letter written by Henderson to defendant. Plaintiff, however, is not restricted to the above mentioned documents to make his case. There is the agreement dated 6th October. The instructions to prepare that agreement were given by defendant's authorized agent; the solicitors who prepared it, being requested to do so by the agent, must be deemed to have been the defendant's solicitors. This agreement contains a complete description of the land, and fully states the terms of the transaction. The full name of defendant as purchaser written in the fore part of the agreement was inserted there by the instructions of defendant's agent. The agreement is not signed at the bottom by defendant, and it may not be binding on him as such an agreement; but, taken in connection with the letters and telegram above mentioned, and the fact that it was acted upon and partly performed by defendant in the making of the cash payment of $100 which was advanced by his agent and reimbursed by defendant himself after knowing of the purchase by his agent, it must, in my opinion, be deemed a sufficient memorandum in writing to take the case out of the Statute of Frauds.

In his first letter defendant asks Henderson to see plaintiff about the purchase of his land, to find out when he can get possession, and to let him know at once of the particulars by wire or mail. In his second letter, after he has been informed by Henderson's telegram that he has bought plaintiff's farm, paid a deposit of $100, that he may get possession at

Digitized by Google

once, and that the price is $15 an acre, instead of repudiating the purchase, or of stating that he had exceeded his authority as agent in closing the bargain, he thanks Henderson for his kindness, speaks of shipping stuff before going down, says he thinks it is a very good deal, and asks him to tell plaintiff that he will move into his house as soon as possible. This shews clearly that he could not be sincere and did not represent the matter truthfully when he pretended at the trial that he had not instructed Henderson to buy the farm for him, but had merely told him that if the west half was as good as the east half he would take it. This is quite inconsistent with what he did and wrote after he was informed by Henderson that he had purchased the farm for him. The second letter may be deemed a ratification of the purchase by Henderson.

As to the defence that, if there was a contract, it was induced by the fraudulent misrepresentation of plaintiff, defendant contends that he was shewn by plaintiff the east half only of the section; that plaintiff told him that the west half was as good as the east half; and that he relied on such representation of plaintiff.

At the trial defendant swore that he thought he had not been on the west half at all, and that he relied entirely on plaintiff's statement as to the quality of the west half.

Both plaintiff and Halliday, who was accompanying defendant, state most positively that the three of them went over the four quarter sections; that after going on the east half from the south up to about 40 rods from the north boundary of the land, they went west up to about the middle of the west half of the section; that from there they went down south following about the middle line, and that plaintiff pointed out a bluff where the west boundary of his land was; that he shewed them several sloughs and ponds and particularly the worst slough on the whole land. Halliday was, except for a short moment, all the time with plaintiff and defendant, and he corroborates plaintiff's statement.

On the evidence, I find that defendant did go over the west half, and that, without inspecting every acre of it, he had a pretty fair idea of what kind of land it was, and that plaintiff did not tell him that the west half was as good as the east half.

As a matter of fact, from the evidence of the different witnesses who have spoken of the quality and value of the

Digitized by Google

lands, it appears that the land of the west half of the section is about the same as the average land in the locality, that the soil of the west half is the same as that of the east half, that there are a few more bluffs and sloughs or ponds on the west half than on the east half, but that a good proportion of them can be easily drained when the land is cleared for cultivation; there are about 125 acres in cultivation on the east half and 75 acres on the west half. It was stated that the east half alone would be worth about $20 an acre without the buildings. Dr. Harcourt, valuator for the Hamilton Provident and Loan Society, in a confidential report made by him in connection with an application for a loan made by plaintiff, after personally examining the land, values the whole section at $9,000. That was in September, 1903, over one year before this transaction took place, and it has been shewn that the land has increased in value since that time.

It is argued on behalf of defendant that plaintiff cannot recover because he did not tender a conveyance of the land to defendant before he brought his action. The agreement for sale was prepared under his agent Henderson's instructions by Messrs. Coldwell & Coleman, who for that purpose practically became defendant's solicitors, and it remained in their hands. With that agreement executed by plaintiff, defendant could enforce specific performance against plaintiff if he refused to carry out the transaction. When they afterwards prepared the conveyance and procured the abstract from the registry office they acted as plaintiff's solicitors. The conveyance and abstract remained in their hands, as well as the agreement, ready to be delivered to defendant on his paying the purchase money.

But, by his letter of 17th October, defendant had formally announced his intention not to carry out the transaction. In the circumstances of this case I do not think that plaintiff was bound to go and make a formal and personal presentation of the conveyance to defendant.

After the close of the evidence Mr. Kilgour asked for leave to amend the statement of defence by alleging that before action the plaintiff had elected to waive performance of the contract and to rescind it, by claiming damages for breach of the contract. This contention is based on a letter written by Messrs. Coldwell & Coleman, dated 16th November, in which they state that they have commenced proceedings against him for damages for failing to carry out his bargain.

Digitized by Google

In said letter they tell defendant that plaintiff, relying upon his letters and written agreement, had sold his stock and otherwise changed his affairs, and they ask him whether he intends to make any settlement, or contest the suit. There is no evidence that such proceedings were commenced, and the letter seems to have been written more as an inducement to bring a settlement than as a formal demand for damages.

Mr. Coldwell opposed the amendment on the ground that it was too late to introduce such amendment in the pleadings, as the letter had been written by his partner, Mr. Coleman, who was then away from Brandon, and he was not prepared to meet the issue raised by it.

I then reserved the question, and, in view of the circumstances above mentioned, I do not think the amendment should be allowed.

I therefore find, on the whole case, that there was a sufficient memorandum in writing to satisfy the Statute of Frauds, and that defendant was not induced to enter into the agreement by the misrepresentation of plaintiff.

In my opinion, plaintiff has established his case, and is entitled to judgment for the balance of the purchase money and interest, with costs of suit.

---

## MANITOBA.

PERDUE, J. APRIL 8TH, 1905.

TRIAL.

## SMITH v. PUBLIC PARKS BOARD OF PORTAGE LA PRAIRIE.

*Municipal Corporations—Public Parks Board of Town—Public Parks Act—Powers of Board—Flooding Lands—Expropriation—Compensation—Injunction—Damages.*

Action to recover damages for injuries alleged to have been occasioned to plaintiff's lands by the closing of a certain culvert, which caused water to rise and flood the lands.

J. A. M. Aikins, K.C., H. A. Robson, and A. Meighen, for plaintiff.

E. Anderson, for defendants.

Digitized by Google

PERDUE, J.:—The defendants are a corporation created under the provisions of the Public Parks Act, R. S. M. 1902 ch. 141, and having control of all parks, avenues, etc., and properties applicable to the maintenance of parks, in the town of Portage la Prairie.

By sec. 39 of the Act, special powers were conferred on the parks board of that town, enabling it to acquire by purchase or expropriation any part or parts of what is known as "The Slough," which is partly on and partly surrounds parish lots 71 to 89 inclusive, in said town, not exceeding 500 acres, inclusive of the land adjacent to the slough requisite to be acquired in order to secure the full benefit of the slough. This slough is a deep, almost circular, depression in the soil, several hundred feet in width, nearly surrounding the above parish lots, and being what was, no doubt, at some former period the bed of the Assiniboine river. This depression is connected with the river by a natural outlet known as "Garrioch's Creek." More or less water remains in the slough all summer, but when the river falls after the spring flood, the water which had entered the slough from the overflow of the river, or from other sources, naturally passes out through the creek, leaving only a portion remaining in the deeper parts of the depression. There appears to have been a general desire on the part of the citizens of the town to utilize the slough as an ornamental lake, by retaining the water in it during the summer, and the special powers given to the parks board of the town by the section of the Act above referred to, was for the purpose of accomplishing this object.

In the spring of 1904 the water was exceptionally high, and the parks board decided to endeavour to retain it in the slough by constructing a dam which would prevent it from flowing out through its natural outlet. Accordingly, on 17th May, 1904, a by-law was passed by the board purporting to authorize its surveyors, engineers, workmen, etc., to enter upon any land the board might require in connection with the expropriation of the slough, to make surveys, lay out the land, and take such other proceedings as might be necessary in carrying out the object. The by-law then declared that for the purpose of taking the benefit to be afforded by the expropriation of the slough, it was necessary to dam up the outlet of the water from the slough, and the workmen, servants, agents, and employees of the board were then authorized and empowered to dam the outlet at whatever point deemed most

Digitized by Google

advisable, so as to keep the slough flooded to a sufficient level for boating and other like purposes.

One of the streets of the town is continued by a grade or embankment across the slough to "The Island," or land embraced within the circular depression. In this grade a culvert had been constructed so as to allow the water to flow through. About the end of May the parks board tried to stop up this culvert by placing in it bags filled with sand. As this did not prove effectual, the board constructed a dam along the east side of the grade, being the side towards the outlet. This dam was formed of piles and planks built close to the grade and with the space between filled in with clay. At the same time the town corporation, at the request of the parks board, raised the grade about three feet, the effect being to increase the elevation of the roadway and at the same time to maintain the water in the slough at a higher level. The parks board paid the cost of constructing the dam, and also contributed $200 to the cost of raising the grade. There was no outlet left in the roadway or dam for the escape of the water, so that it was held, to the west of the dam, at the high level at which it was in June when the work was completed.

Plaintiff is the equitable owner and occupant of some 350 acres of arable land on the island, and of about 100 acres of the land comprised in the slough, abutting upon and adjoining his arable land. A portion of this land in the slough was used by plaintiff as meadow land, and hay was cut upon it to a greater or less extent in ordinary years. The effect of the dam constructed by defendants was to keep the whole of plaintiff's land in the slough covered with water throughout the whole of the year, and it is now in this condition. It has had the effect of depriving him of the use of his meadow land, and it had also in the season of 1904, as he alleges, the further effect of flooding a portion of his arable land and of rendering a further portion unfit for cultivation owing to the seepage through the soil of the high water in the slough. He also claims that a roadway or grade, constructed by him across the slough for the purpose of crossing it, has been covered with water and otherwise injured, so that he has been completely deprived of the use of this roadway.

Defendants have raised the defence that the acts complained of were done by them under the exercise of their powers conferred by the Public Parks Act and the Municipal

Digitized by Google

Act; that they took possession of part of the slough for public park purposes with the intention of expropriating the same; and that they notified the plaintiff of their intention of expropriating the portion of his land prejudicially affected. They further set up that plaintiff has no cause of action, and that the remedy, if any, is by arbitration under the expropriation and arbitration clauses of the Municipal Act.

No notice from defendants to plaintiff of intention to expropriate was proved at the trial, and I find as a fact that none was given. Plaintiff did not consent to defendants' action in constructing the dam, but, on the contrary, protested against it. The question therefore arises, had defendants power under the above Acts to enter upon, take possession of, or occupy plaintiff's land without first expropriating the same?

By sec. 31 of the Public Parks Act, the board may pass by-laws for the use, regulation, protection, and government of parks, boulevards, grass plots, etc., under control of the board, for the planting of trees on any boulevard, etc., and for assessing the cost on the real properties fronting on the same. Sub-section (a) provides for the giving of notice of the proposed tree planting to the owners of such properties, and, unless the proposed work is petitioned against within a month, the board may proceed. Section 36 permits real or personal property to be devised, conveyed, or bequeathed for the purpose of a park, or for the establishment on park properties of museums, gardens, etc. Section 37 gives power to the board to select and acquire by purchase or otherwise, or by lease, lands (whether wholly or partly covered with water), rights and privileges needful for park purposes.

Section 43 deals more extensively with the powers of park boards. It enables the board, its engineers, surveyors, servants, and workmen, with the consent of the owner, to enter upon the lands of any persons and make surveys for park purposes, including the supply of water for artificial lakes, etc., and, with the consent of all parties interested capable of consenting, to divert and expropriate any river or pond or water suitable for its purposes, and the board may contract with the owner or occupier of the lands and with those having an interest in the water, for the purchase or renting thereof, or of any privilege which may be required for the purposes of the board.

The above sections set out the powers of the board as to acquiring lands, or privileges connected with land, provision

Digitized by Google

being made for deciding by arbitration the amount of compensation to be made in case of a disagreement between the board and the owner. The original Act gave no power of expropriation to the board. A clause to provide for this was subsequently added, being now sec. 44 of the present Act, R. S. M. 1902 ch. 141. This section is as follows:—

"The board may exercise all the powers of the council under the Municipal Act in regard to all expropriations of lands and property deemed necessary to be taken or entered upon for the purposes of a park, but the council is not hereby divested of any right or power in regard to the same."

The provisions contained in sec. 39 of R. S. M. 1902 ch. 141, enabling the parks board of Portage la Prairie to acquire by purchase or expropriation any part or parts of the slough were enacted subsequently to the passing of what is now the above cited sec. 44.

It was contended by defendants that, under these sections 44 and 39, there was conferred upon them, in respect of expropriating any part or parts of the slough, all the powers possessed by municipal councils in regard to expropriations of land and property, and that under a proper construction of these sections such part or parts of the slough might be taken or entered upon without first expropriating the same.

Very wide powers have, no doubt, been conferred by the Municipal Act upon councils in regard to certain matters where the public interests demand prompt action, and where the delay that would be occasioned in first assessing the amount of the compensation would interfere with the speedy completion of a necessary public work. Hence power has been given to a council to enter on land required for roads and streets (sec. 693), and also upon land required for the purpose of drains or watercourses (sec. 636), and this, it has been held, the council may do without first proceeding to ascertain the amount of compensation to be paid to the owner of the land taken: Harding v. Township of Cardiff, 29 Gr. 308, 2 O. R. 329; Stonehouse v. Township of Enniskillen, 32 U. C. R. 562. But statutes which encroach upon the rights of the subject in respect of his private property, or which enable public corporations to take his property without his consent, must be construed with the greatest strictness: Maxwell on Statutes, p. 399; Dillon Mun. Corp. sec. 603 et



Digitized by Google

seq. If, therefore, power has been given to defendants by the provisions of the above Acts to enter upon or occupy plaintiff's land without first taking steps to expropriate the land and to compensate him therefor, these provisions should clearly confer the power, and if the meaning is at all doubtful, the construction most favourable towards the protection of his rights should be adopted. Keeping this in view, I think the proper construction of sec. 44 of the Public Parks Act is that the same powers possessed by the council under the Municipal Act in regard to expropriations of lands and property for the purposes of a park are conferred upon the public parks board. That this was the intention of the legislature appears to be clearly indicated from the fact that a provision is inserted in the section, that the council "is not hereby divested of any right or power in regard to the same;" that is to say, it is not divested of any right or power to expropriate land for park purposes.

When we come to examine the powers of a council to expropriate land for a park, we find that under sec. 755 of the Municipal Act a city may acquire real property for that purpose by purchase, lease, or expropriation. The sections following provide the means by which the land may be expropriated. By sec. 769 it is provided that upon payment of the amount awarded for compensation into the hands of the county court clerk the land shall be vested in the city and the council may then enter into possession of the land. This shews that the proceedings for expropriation and compensation are made a condition precedent to the right to enter upon land required for park purposes. It is further to be observed that sec. 43 of the Public Parks Act gives to the board power to enter upon land and to interfere with rivers, ponds, or streams, only with the consent of the owner.

I have therefore come to the conclusion that defendants had no right to occupy plaintiff's property by converting his meadow and part of his arable land into a lake through the construction of the dam, without first expropriating the land and making compensation.

I cannot give effect to the contention that defendants had no power to construct the dam in question, and that, therefore, there is no liability. I think that under secs. 39 and 43 they have the necessary power. The complaint is that this power was exercised without taking the necessary preliminary steps to acquire by purchase or expropriation the parts of the slough proposed to be occupied. Defendants authorized the

Digitized by Google

work and adopted and took the benefit of it. Whether the damages suffered by plaintiff resulted directly from its construction or were caused by the negligence of those employed to do it, defendants are liable. See Foster v. Lansdowne, 12 Man. L. R. 43; Mersey Docks Co. v. Gibbs, L. R. 1 H. L. 93; Foreman v. Mayor of Canterbury, L. R. 6 Q. B. 214; Brice on Ultra Vires, p. 416; Atcheson v. Portage la Prairie, 10 Man. L. R. at p. 45.

As defendants have not taken the steps provided by the statute to expropriate and to settle the amount of the compensation, an action for damages at the suit of the plaintiff may be sustained: North Shore R. W. Co. v. Pion, 14 App. Cas. 612; Corporation of Parkdale v. West, 12 App. Cas. 602; Arthur v. Grand Trunk R. W. Co., 25 O. R. 40.

I have had considerable difficulty in arriving at the amount of damages to be awarded. Defendants are a public body created for the purpose of taking charge of certain matters for the general benefit of the citizens. The members of the board receive no remuneration for their services, and the corporation makes no profit from its operations. The object of the work complained of was to add to the attractiveness of the town and to afford to the citizens a place of recreation. Although the board acted precipitately, there was evidence to shew that in this they yielded to the generally expressed desire of the people of the town that immediate action should be taken. The case is not therefore one for exemplary or excessive damages. The amount to be awarded should be such as to reasonably compensate plaintiff for the loss he has sustained by the acts of defendants up to the date of the trial of the action, not taking into account any future damage he may sustain from the continuance of the trespass, and not including the value of any land taken by the board or the damages for permanent injury to any portion of it.

It appeared from the evidence that a portion of the arable land was kept under water during the season of 1904, and that some injury was caused to the crops on other portions by percolation of the water through the soil. Plaintiff was also deprived of the use of the hay land and of his causeway across the slough. The causeway has also been injured by the action of the water. I assess the damages to the arable land and crop at $300 and the damages to the hay land and causeway at $180, making in all the sum of $480, judgment for which will be entered for plaintiff.

Digitized by Google

An amendment to plaintiff's statement of claim was added at the trial in which he claimed that defendants should be restrained by injunction from continuing the trespass and the dam. Where a trespass is continuing and substantial damage is being caused, the Court will generally interfere to restrain the further commission of the trespass and may grant a mandatory injunction: Kerr on Injunctions, 84 and 114; Wright v. Turner, 29 Gr. 67; see also Canadian Pacific R. W. Co. v. Park, [1899] A. C. 535.

If defendants will undertake to proceed within three months to expropriate the portion of plaintiff's land occupied or flooded by them, and to settle and pay the compensation to be awarded plaintiff for the land so taken or occupied, and for any other injuries to his property caused by the work, and to pay the amount of the judgment herein, then the application for an injunction shall lapse. If this undertaking is not given, or if given is not carried out, plaintiff shall have leave to renew the motion for injunction, and on such motion to use the evidence taken in this cause and also such affidavits or further evidence as he may deem necessary; defendants to have leave to answer the same.

Defendants must pay plaintiff's costs of the action.

---

## BRITISH COLUMBIA.

### (VICTORIA.)

FEBRUARY 11TH, 1905.

FULL COURT.

### CENTRE STAR MINING CO. v. ROSSLAND MINERS UNION No. 38.

*Solicitor—Misconduct — Defeating Execution — Accepting Transfer of Property of Client after Verdict against him —Summary Order against Solicitor—Restoration of Property.*

Appeal by plaintiffs from part of an order of IRVING, J., dismissing plaintiffs' application for an order requiring defendants' solicitors, S. S. Taylor and James O'Shea, to deliver up to the sheriff of South Kootenay, or to such other officer or person as this Court should direct, all printing presses,

Digitized by Google

type, and other material comprising the plant of the "Evening World" newspaper at Rossland, or the proceeds thereof, if sold.

The action was one for damages for conspiracy in unlawfully procuring a strike of plaintiffs' employees. The trial took place at Victoria, and on 16th July, 1904, the jury returned a verdict fixing the damages suffered by plaintiffs at $12,500. A motion was thereupon made by counsel for plaintiffs for judgment but (as stated in the affidavit of Mr. A. C. Galt, solicitor and one of the counsel for the plaintiffs), in view of the fact that the verdict was rendered "on Saturday afternoon and that counsel (Mr. S. S. Taylor) for the defendants announced that his argument against the motion would occupy considerable time, it was arranged that written arguments should be filed on behalf of all parties concerned at certain specified dates expiring on or about 11th August next."

On 17th August judgment was given in favour of plaintiffs against defendants for $12,500, and costs, and on 19th August plaintiffs obtained the appointment of a receiver; they also took garnishee proceedings and issued execution, but nothing was realized. They then examined defendant Peter R. McDonald, the financial secretary of the defendant union, and ascertained that at a meeting of the union on 6th July, 1904, authority was given to issue a cheque "for $970 to H. S. Seaman re law suit," and the cheque was issued, according to McDonald's evidence, to defray the expenses of the Centre Star law suit.

During the trial of the action the following letter from Taylor & O'Shea to Alexander Constantine, one of the defendants, was produced, and although not used in evidence was marked for identification. It was now made an exhibit to Mr. Galt's affidavit:

"Taylor & O'Shea,
Barristers, Solicitors, etc.

Nelson, British Columbia,
February 1, 1904.

Alexander Constantine, Esq.,
Rossland.

Re Centre Star v. Rossland Miners
Union and others.

Dear Sir,—You are defendant in this action with many others, and notice of trial has been given by the plaintiffs for

Digitized by Google

the Court at Victoria, on the first of March, to which it would be well that you would go to give evidence if possible, and we should like to know at once whether you will be able to go.

We tried our best to force a trial at Nelson or Rossland and obtained an order for trial at Nelson, but the Court of Appeal upset this order, and we are now forced to go to trial at Victoria. Plaintiffs are claiming against all defendants $50,000 damages.

While we hope to win the action, still with the jury at Victoria, where such strong prejudice has prevailed against the Western Federation of Miners, we feel afraid that a verdict might be given against you; therefore it is very necessary if you have any property in your name to make disposition of it at once. It is very dangerous to convey to your wife, because the law is that a voluntary conveyance, on the eve of a trial of law suit against you, is no good.

We think it is our duty to fully advise you in time, however, as we would feel very sorry to have you lose the property that you have worked so hard for.

We hope to hear from you at once with regard to whether you can attend as witness on your own behalf at the trial .

You remember that the day of trial is Tuesday the 1st day of March next.

Yours truly,

Taylor & O'Shea."

The plaintiffs' solicitor, Mr. A. C. Galt, deposed, in an affidavit used in support of the summons, that the defendant Peter R. McDonald transferred in February, 1904, certain real estate in Rossland owned by him to a relative; that the defendant Preston had transferred real estate in Rossland owned by him; and that the other individual defendants against whom judgment was recovered possessed no property in Rossland out of which anything could be realized; that on 30th September he called at the building where the "Evening World" used to be published, until it discontinued publication during the trial of this action, and that a man came forward who said his name was Collis, and that he and one Fletcher formerly owned the "Evening World" plant subject to a chattel mortgage for $1,300, advanced by the defendant Miners Union for the purchase of said plant; also that the plant was worth fully $1,000, and that it had recently been sold by said union to Mr. Taylor, the defendants' solici-

Digitized by Google

tor, and that a deal was pending for the resale of said plant for a sum exceeding $500.

In answer to the summons the affidavit of S. S. Taylor was filed, and the paragraphs in it referring to that part of the summons which is the subject of this report were as follows:—

4. With regard to the 2nd paragraph of the said summons no judgment had been given in the action and no receivership order or injunction granted prior to the disposition of the $970 referred to in the 2nd paragraph, and the said $970 has not as yet been paid to our firm for costs, but we have made a demand from the Western Federation of Miners general office (through whom the said moneys should pass, as I am informed by James Baker, the executive officer of the said general office of the Western Federation of Miners), for the said moneys, because the defendants in this action owed us a very much larger amount than said moneys amount to, over and above all sums which have been received up to date.

5. With regard to the 3rd paragraph of the said summons, I proceeded to Rossland immediately after the trial of this action at Victoria, B.C., and a considerable time before the judgment given in the same and before any receivership order was made or injunction granted and demanded some security for at least a reasonable portion of our costs; the result was that I visited the "World" plant upon which the union had a chattel mortgage and arranged for them to pay $100 to clear the claim of Messrs. Fletcher & Collis, and to hand over to me the plant at $500, which I then believed to be its full value. I have held the said plant since that time until about a week or ten days ago and have attempted to sell it to several persons in the printing business, with the result that I have not been able to get an offer from any person except A. T. Collis & Co., of Rossland, the former owners, and after incurring considerable expense in attempting to make this sale, with the loss of considerable time, I have only been able to sell it for $575, $100 having been paid down and the balance extends over two years without any other security than the lien agreement on the plant. This property is old and dilapidated excepting one printing press, which is really the only part of the plant which is actually of commercial value. The acquiring of this property by me from the Rossland Miners Union is absolutely bona fide in every respect; it was not in any way done to defeat, delay, or hinder the plain-

Digitized by Google

tiffs in any judgment that they might at that time or afterwards obtain in this action. It was solely for the purpose of getting some solid security for the large amount of money that these defendants owed me on account of costs, and at the time that the said property was received by me there was no judgment, and very strong arguments were being urged why judgment should not be entered against the defendants in this action. In addition I have been instructed to appeal this action and have ordered the notes of evidence which when received notice of appeal will be prepared and served upon the plaintiffs' solicitors. I absolutely deny that the acquiring by me of the "World" plant was a part of or in any way connected with any scheme or plan to defeat the plaintiffs in recovering any part of any verdict that they might receive. It is true, of course, that at the time that I got the property the jury had rendered their verdict, but the motion for nonsuit and the motion for judgment had not been disposed of, and I verily believe that we have good grounds for succeeding upon these motions on appeal. The "World" plant was turned over to me as the result of my request; I found that they were attempting to sell or dispose of it, and I believed because the newspaper had ceased publication that the property had come back into their hands quite irrespective of this action, and I determined that it was time that they should make further payments to me on account of costs, and hence the putting through of that transaction.

6. With regard to the 6th paragraph of the said summons, I have been informed by the officers of the Rossland Miners Union, including Peter R. McDonald and the present secretary, J. C. Scott, that the members of the union would not pay their usual dues if they knew that such moneys were to go to the Centre Star, and I therefore advised them, rather than to sacrifice the interests of the Union, to reduce the dues to 10 cents, then the members would have no objection to having at least that amount paid to the receiver, and which might ultimately pass to the Centre Star. I verily believe that they have a perfect right to control matters of their constitution and to either raise or reduce their monthly dues as they see fit, hence the reason for my advice as above stated.

7. In answer to Galt's statement as to his conversation with Collis he produced a letter from Collis in which he stated: "Now Mr. Galt has construed my conversation to suit

Digitized by Google

himself. He asked what the plant was worth; I told him that $500 was a good price the way the plant stood to-day, as outside the press it was junk. He said he understood that it included the plant now operated by Collis & Co., which I quickly informed him was not the case." He then said: "Now, if anyone wanted to start a paper would it not be worth $1,000?" Here is my answer, and what the honourable gentleman construes to suit himself and further his own ends: "If the plant had to be duplicated it would cost that amount, probably more, but you must remember that you would have all new material."

The summons was argued before Irving, J., who on 27th October, 1904, delivered the following judgment:

IRVING, J.:—I am unable to find any authority shewing that I have jurisdiction, or if jurisdiction there is, that I ought at the instance of plaintiffs to deal summarily in this action, with defendants' solicitor.

In the absence of some direct authority, I think it would be mischievous for me to create a precedent of this kind, when the usual method of attacking an alleged fraudulent assignment is open to the plaintiffs.

The plaintiffs must pay the solicitors the costs of this portion of the summons.

Plaintiffs appealed, and the appeal was heard at Victoria on 10th and 11th January, 1905, before HUNTER, C.J., MARTIN and MORRISON, JJ.

A. C. Galt, for appellants.

E. P. Davis, K.C., for respondents.

HUNTER, C.J.:—. . . With regard to the difficulty felt by the learned Judge below about creating a precedent, I may say that I feel no such embarrassment, because, when the Court encounters new phases of fraud then it is time to make new decisions and new precedents. And the material upon this appeal to my mind presents a very clear case where the solicitor has been guilty of misconduct in the defence of the suit from beginning to end. There is a statement in the letter to one of the litigants to the effect that the solicitor fears that a verdict will be given against him, and "therefore that it is very necessary if you have any property in your

Digitized by Google

name to make disposition of it at once. It is very dangerous to convey to your wife, because the law is that a voluntary conveyance on the eve of a trial of a law suit against you is no good." Now, that letter was evidently not written by inadvertence, as it was apparently a circular letter written to all the clients for whom he was acting. I think a solicitor who can write a letter of that sort has a very poor notion of the dictates of professional honour; and not only that, but that he is floundering in a quagmire of ignorance and moral obliquity. He evidently does not know that it is an offence at common law, that it is an offence under the Statute of Elizabeth, that it is a crime under the Criminal Code of this country, for any one to transfer his property with the intention of defrauding a creditor. And of course, if that is so, then it must be a crime for any one, and especially a solicitor, to counsel the commission of such an act. I have not the smallest doubt that the solicitor who wrote that letter was guilty of an indictable offence, and that he also committed a gross contempt of the Court. As, however, no one has seen fit to bring the matter before the Court in a formal way, I do not think it is necessary on this occasion to take any further notice of it than to mark our sense of the misconduct revealed by the material before us.

Now, it has been suggested by the learned counsel for the solicitor that the transfer can be attacked, if at all, only under the Fraudulent Preference Act. In my opinion, this transaction is illegal at common law; it is illegal under the Statute of Elizabeth, as that statute strikes at the case of a debtor who makes a preference with a view to reserving a benefit for himself, and I can conceive of no clearer case of a debtor reserving a benefit for himself than where he transfers to his solicitor the assets which ought to go to pay his creditors. But, even assuming that the transaction could be impeached only under the Preference Act, it is idle to talk of bona fide pressure in this case, as the taking of this property by the solicitor was the last chapter in a series of acts designed to defraud the plaintiffs of the fruits of any judgment which they could recover. Justice would indeed be both halt and blind if a counsel were allowed under the circumstances that have been disclosed to us, to use the opportunity afforded by an adjournment granted after a verdict, at his own request, to snatch away property for the benefit either of his client or himself, which ought to go to pay his client's just debts.

Digitized by Google

I think that the counsel for the company has been very moderate in his demand indeed, and that the judgment of the Court ought to order this property to be restored within ten days to the sheriff, or in default, that the sum of $575, being the value accepted by Mr. Galt, be paid into Court by the solicitor, under penalty of attachment.

The occasion is a very suitable one for recalling the words of Sir Alexander Cockburn, Lord Chief Justice of England, that an advocate ought to uphold the interests of his client per fas, not per nefas; that the arms which he wields he ought to use as a warrior, not as an assassin.

MORRISON, J., concurred.

MARTIN, J., dissented, giving lengthy reasons in writing, and concluding as follows:—I am unable to take the view, with the greatest respect to contrary opinions, having regard to the very unusual circumstances of the present case, the incomplete way in which the evidence is now before us, and the impossibility of satisfactorily trying the charge of this complicated nature on conflicting affidavits, that the conduct of the solicitors concerned should be condemned or passed upon till after the truth of the charge be determined in the proper manner, viz., by a trial. The usual and generally adequate course of directing a reference would not do justice between the parties in this very special case, for the reasons mentioned, and in a charge of this grave and complicated character every proper opportunity should be given to the accused to exhibit the legality and propriety of his actions, for if the charge against him is to be taken as established in its entirety the offence is certainly one which can hardly be deemed to be adequately dealt with by the order which my learned brothers have made. . . .

When the solicitors filed their affidavits in reply to the charge, proceedings should have been stayed pending the result of a trial, but instead of this the plaintiffs chose to appeal, and, in my opinion, the appeal must fail in the main and should be dismissed, but without costs; for while on the one hand the appellants should not obtain the order asked for, yet on the other the solicitors were not entitled to have the application against them dismissed, but stayed as aforesaid; and therefore the order appealed from should be varied by directing either that the application should stand

Digitized by Google

for further consideration and disposition till after the trial, or that it be referred to the trial Judge to be dealt with, which probably would be the better course to adopt, for he would be in the best position to dispose of it after having had all the parties and their witnesses before him.

---

## BRITISH COLUMBIA.

### (VANCOUVER.)

HENDERSON, CO.C.J. APRIL 4TH, 1905.

TRIAL.

### DOHERTY v. VANCOUVER GAS CO.

*Master and Servant—Wrongful Dismissal—Election to Treat Contract as Rescinded—Previous Action for Wages—Recovery of Judgment—Estoppel.*

Action for wrongful dismissal of plaintiff from service of defendants.

Plaintiff brought two actions against defendants, one for a balance of wages due, and the present action for damages for wrongful dismissal. The first action was tried on 12th October, and plaintiff obtained a judgment for the balance of wages due him. The trial of this action then took place before a jury, when a verdict was given for plaintiff.

J. Edward Bird, for plaintiff, on motion for judgment, cited the following authorities: Hartley v. Harman, 11 A. & E. 802; Pooley v. Driver, 5 Ch. D. 458; Maskelyne v. Strollery, 16 Times L. R. 97; Palmiter v. Copeland, 6 M. & W. 104; Baylis v. Lawrence, 11 A. & E. 920; Archibald's Practice, 4th ed., pp. 646, 655; Fletcher v. MacGillivray, 3 B. C. R. 49; McDonald v. Trustees of the Pandora Street Methodist Church, 5 B. C. R. 521.

L. G. McPhillips, for defendants, cited Goodman v. Pocock, 15 Q. B. 576.

HENDERSON, CO.C.J.:—On motion for judgment by Mr. Bird, on behalf of plaintiff, in accordance with the verdict of the jury, Mr. McPhillips asks for a dismissal of the action

Digitized by Google

on the following ground, set out as paragraph 1 of the defence, viz.:

"The plaintiff ought not to be admitted to say that he was employed by the defendants under the contract alleged or under any contract, because on 12th October, 1904, the plaintiff commenced an action in this Court, on a quantum meruit, for work and labour performed by him for the defendants up to and inclusive of 10th October, 1904, on which day plaintiff alleged that he was summarily dismissed by the defendants. The plaintiff proved at the trial of the said action that defendants were indebted to him on a quantum meruit in the sum of $21.50, and that he was summarily dismissed by defendants on 10th October, 1904, and judgment was on 31st October, 1904, given in his favour for $21.50, the amount claimed by him on the quantum meruit. The defendants now say that plaintiff, having elected as aforesaid to treat the alleged contract as rescinded and sue on a quantum meruit, is estopped from setting up that there ever was or is now any contract between plaintiff and defendants as alleged, and from suing for damages for breach of such alleged contract."

The point was fully argued and numerous authorities were cited on both sides.

Counsel for plaintiff argued strongly that it was too late for defendants to take the objection, and that it should have been taken before the trial—I assume by having the case set down for hearing on the point of law. I cannot agree with this contention. The point was raised immediately after plaintiff's case was closed, and I reserved it for argument until after the close of the whole case.

After consideration of the argument and authorities cited, I have come to the conclusion that the point is well taken, and that defendants should succeed.

The principle governing cases of this kind, it seems to me, is stated by Patteson, J., in his judgment in Goodman v. Pocock, 15 Q. B. at p. 580, as follows: "Mr. Smith in the note . . to Cutter v. Powell, 2 Sm. L. C. 20, says, perhaps 'the result of the authorities on this subject may be, that a clerk, servant, or agent, wrongfully dismissed, has his election of three remedies, viz.: that 1. He may bring a special action for his master's breach of contract in dismissing him, and this remedy he may pursue immediately. 2. He may wait till the termination of the period for which he was hired,

Digitized by Google

and may then, perhaps, sue for his whole wages, in indebitatus assumpsit, relying on the doctrine of constructive service. . . 3. He may treat the contract as rescinded, and may immediately sue, on a quantum meruit, for the work he actually performed.' " Coleridge, J., in the same case at p. 583, says: "In a case like this the servant may either treat the contract as rescinded and bring indebitatus assumpsit, or, he may sue on the contract; but he cannot do both." And Erle, J., on the same page says:—"The plaintiff had the option either to treat the contract as rescinded, and to sue for his actual service, or to sue on the contract for the wrongful dismissal. He chose the latter course; and he cannot now turn round and try the former course."

It will be observed that the present case is the converse of Goodman v. Pocock, but I think the principle is the same in both cases, that is to say, that the plaintiff having elected thereby exhausts his remedy.

The result is that the action must be dismissed.

---

## NORTH-WEST TERRITORIES.

### (EASTERN ASSINIBOIA.)

WETMORE, J. MARCH 30TH, 1905.

TRIAL.

### KRIENKE v. MOHR.

*Sale of Goods—Contract—Breach—Failure to Give Lien Notes for Price—Acceptance of Goods—Measure of Damages—Lien on Goods—Relief not Claimed.*

Action for damages for breach of contract.

Levi Thomson, Wolseley, for plaintiff.

B. P. Richardson, Grenfell, for defendants.

WETMORE, J.:—The real questions of fact in issue in this case are: whether the machine (engine and separator) sold by plaintiff to defendants was sold on one day's trial or six days' trial, and whether it worked satisfactorily, and whether defendants so conducted themselves that they accepted the machine and were bound to pay for it.

Digitized by Google

The overwhelming evidence supports the contention of plaintiff that the machine was sold on one day's trial. Whatever may have taken place at John Mohr's house on Sunday 25th October, I am satisfied that, after the defendant John Mohr and Jacob Mohr refused to sign the notes as requested by plaintiff, and the machine was unloaded, the bargain was that they were to take the machine on one day's trial, and if it did not work satisfactorily they were to return it or to pay plaintiff for the day's threshing, and $25 for the purpose of moving it back. Plaintiff is supported by the testimony of Housser, Goering, and William Schoffer. Moreover, two of defendants' witnesses distinctly supported that view of the case, namely, Jacob Mohr and John Schoffer. And the evidence of defendant John Mohr himself tends in that direction. Defendants admit that at the time this bargain was made plaintiff called his men who were about there up, and told them what the bargain was, and that he told it correctly. Jacob Mohr and John Schoffer both distinctly swear that on that occasion plaintiff told the men that defendants and Jacob Mohr were to take the machine on one day's trial. That they retained it after one day's trial is also clearly established; in fact, they retained the machine, paid men for working it, and solicited threshing from other persons, and kept it and dealt with it as their property, accepted by them as such, until the threshing season was finished. There is no doubt that afterwards they became dissatisfied and wished to return the machine, but I am inclined to think that this dissatisfaction only arose when they were led to believe that there was some claim against it. The evidence does not satisfy me that the machine did not work satisfactorily, that is, from any defect in the machine. It was a second-hand machine, and defendants knew it when they purchased it. There is no doubt that after it got to John Mohr's it did not work, but that was because the concave was broken by some foreign matter passing through it—that was not due to any defect in the machine itself. It also seems that the machine stopped from time to time. Now, the evidence on the part of defendants with respect to the cause of the stoppages is of a most vague character, and very unsatisfactory, and they have failed to satisfy me that the stoppages were due to any defect in the machine; the cause appears rather to have been of a character similar to that of the breaking of the concave; and I would not be at all surprised if some stoppages were due to the machine being

Digitized by Google

improperly manned. I am satisfied also that defendant Wirth on more than one occasion expressed himself satisfied with the working of the machine. Having had the one day's trial and not thereafter promptly returning it or paying plaintiff $25 to take it back or offering to do so, but continuing to work it as they did, they must carry out their agreement. The fact that defendant Wirth, with the knowledge and approval of defendant Mohr, went to make inquiries of the deputy sheriff as to any claim against the machine, points in the direction that they were satisfied with the working of it. For even the six days were up then, and if they were not satisfied with its working, and were going to return it, and had the right to do so, what did it matter to them whether it was under seizure or not?

The statement of claim asks for specific performance by ordering defendants to sign the notes which were to be given for the machine, namely, 3 notes each for $400, payable on the 1st days of January, 1905, 1906, and 1907. This relief cannot be granted, because, on a well-known principle applicable to actions for specific performance, adequate relief can be obtained in another way. This is not an action brought for the price of the machine; the action is based upon the omission of defendants to give the promissory notes, and may be treated as an action for the breach of that special agreement. That an action will lie for such a breach I refer to Mussen v. Price, 4 East 147, and Paul v. Dodd, 15 L. J. C. P. 177.

And the measure of damages is the full amount of the notes which were to be given: see Mayne on Damages, 6th ed., p. 176; and 2 Sedgwick on Damages, 8th ed., sec. 756.

As the notes in this case were to bear 7 per cent. interest, plaintiff will be entitled to recover $1,200, the agreed price for the sale of the machine, and interest at 7 per cent. on $400 from 26th October, 1903, to 4th January, 1905, and from that date at the rate of 6 per cent. per annum until the date of judgment; and interest on $800 from 26th October, 1903, at the rate of 7 per cent. per annum until judgment.

And there will be judgment for plaintiff accordingly.

But I am of opinion that plaintiff is entitled to further relief in this case. It is conceded that the notes which were to be given for this machine were to be lien notes, and that they were to contain a clause by which plaintiff would retain a lien upon the machine. Plaintiff therefore is entitled to

Digitized by Google

a declaration that he has a lien upon this machine for the amount of the judgment above awarded. There is no specific prayer for such relief, but I am of opinion that under sec. 8, par. 5, of the Judicature Ordinance, and Order 21, Rule 6, of the English Rules, I may grant such relief, although not specifically prayed for. Paragraph 5 of sec. 8 of the Ordinance provides that "the Supreme Court, in the exercise of its jurisdiction in every cause or matter pending before it, shall have power to grant and shall grant, either absolutely or on such reasonable terms and conditions as to it shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that as far as possible all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any such matters avoided." The English Rule provides that "Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and it shall not be necessary to ask for general or other relief, which may always be given as the Court or a Judge may think just, to the same extent as if it had been asked for." This is a case to which I think these Rules are applicable, and a declaration will be made as above stated.

Plaintiff will also have judgment for his costs of this action, to be taxed.

---

## NORTH-WEST TERRITORIES.

### (EASTERN ASSINIBOIA.)

WETMORE, J. APRIL 4TH, 1905.

CHAMBERS.

### McCALLUM v. WILLIAMS.

*Interpleader—Stakeholder — Demand and Refusal of Indemnity—Replevin—Nominal Damages— Costs.*

Interpleader application by defendant.

J. T. Brown, Moosomin, for defendant.

E. A. C. McLorg, Moosomin, for plaintiff.



Digitized by Google

WETMORE, J.:—This is an interpleader application on the part of defendant. The claimant McLean was in possession of a horse, and offered to sell it to defendant. Defendant did not wish to purchase it, but wanted to hire a horse. Thereupon an arrangement was made between them by which McLean let defendant have the horse to work, or to try to work it, as it was baulky, and if defendant could not work it, he was to return it; and if it suited him he was to have the right to purchase it. McLean made no representations as to his being the owner of the horse, but he was in apparent possession of it. This occurred in the latter part of July. McLean, apparently, has disappeared. I have come to this conclusion because he cannot be served personally with process, and on inquiry made his whereabouts could not be ascertained. As a matter of fact the horse belonged to plaintiff and his brother Zachariah, and they claimed the horse from defendant. McLean was their agent and was selling horses for them on commission. Defendant was willing to give it up provided he got a clearance, as he called it, and plaintiff expressed himself upon more than one occasion as willing to give a clearance on the horse upon it being brought in, and defendant promised to bring the horse in. He did bring it in on one occasion, but plaintiff was not in town, and he took it back again. A day or two before the action was brought plaintiff went to defendant's place, and he had in his possession a lien note made by one Angus Ferguson to him. Plaintiff had sold the horse to Ferguson, but it had not been satisfactory, and he had taken it back, and plaintiff on the occasion last mentioned shewed this note to defendant as being evidence of the fact that he owned the horse, and according to him he offered to give defendant a clearance, and he says that defendant refused to deliver the horse and said that a clearance was no good and that he would have to replevy it. The evidence as to the nature of the clearance he offered is very vaguely set forth in plaintiff's affidavit. Defendant, however, upon his cross-examination on his affidavit sets this forth more clearly, and according to him the only clearance offered was a memorandum that plaintiff owned the horse, and had received it from defendant, and defendant replied that he did not know that that would be satisfactory, and plaintiff stated that if he did not give the horse to him on those terms, that is, upon receipt of this memorandum, he would replevy it, and defendant replied, "All right, replevy it." That is the only evidence I have of the character of the clear-

Digitized by Google

ance which plaintiff offered. I would understand a clearance to be something in the nature of an indemnity, and I think that defendant was quite correct in stating that the memorandum which plaintiff offered "as something," to use his expression, "to stand between him and McLean," amounted to nothing at all.

After very considerable hesitation, I have come to the conclusion that this state of facts warranted defendant in interpleading. It has been set up that McLean has made no claim. Well, McLean is not here to make a claim, but who is to say that he may not come back and make one. At any rate defendant might feel reasonably doubtful as to whether he would not do so. It has also been set up that defendant has not made inquiry. Of whom was he to inquire? It would have been a very simple matter for plaintiff to have given a memorandum agreeing, if he delivered the horse up to him, to keep him harmless and indemnified against McLean and all persons claiming under him, and I think the fact that plaintiff would only give the memorandum which I have mentioned was sufficient to make defendant suspicious and justify him in interpleading. It has been alleged in the affidavit of Zachariah McCallum that some time previous to this horse being delivered to defendant it was stated to defendant or in his hearing that McLean was only selling on commission, and that plaintiff and Zachariah owned this horse Defendant denies that this was said in his hearing. It is possible, however, that it may have been said in his hearing, and it is something that may have passed out of his memory, as it very probably would, it being a mere casual conversation. In the Digest of English Case Law, vol. 8, col. 359, Nelson v. Barter, 2 H. & N. 334, 33 L. J. Ch. 705, 10 Jur. N. S. 832, 12 W. R. 999, is cited, and it is there stated that "a mere stakeholder is justified, if there is the slightest doubt or risk arising from conflicting claims, in calling upon the person really interested upon either side to indemnify him against such risk, and if he refuses or neglects to do so to file a bill of interpleader in equity." I have referred to this case in the 33 L. J. Ch. It does not bear that out in so many words, but I think it may be gathered from it at least that, in certain circumstances, a demand of indemnity and a refusal to give it would justify an interpleader application. And I am of opinion, in the circumstances of this case, an indemnity having been practically demanded and refused, that defendant was justified in making this application. It has also been

Digitized by Google

set up that it was a matter of common knowledge that McLean was merely selling horses on commission for plaintiff. I notice that in both the affidavits of Angus McCallum and James W. Brown it is only stated generally that it was common knowledge that McLean was selling horses on commission, not that he was selling on commission for plaintiff. I think this whole question might have been easily adjusted on 4th October if Mr. Augus McCallum had given defendant what would really have been an indemnity instead of a mere receipt, which he practically offered to give.

The order will be that the claimant McLean be barred; that plaintiff pay to defendant his costs of interpleader; that the claimant pay to plaintiff his costs of interpleader, and also the costs so ordered to be paid by him to defendant; that plaintiff be at liberty to sign judgment in the replevin action against defendant for nominal damages, say, $5, and costs; and that the amount of such judgment and the interpleader costs awarded to defendant be set off one against the other, and the party in whose favour the balance may be after such set-off, have judgment and execution for such balance.

---

## YUKON TERRITORY.

DUGAS, J. MARCH 1ST, 1905.

CHAMBERS.

### BOCKFINGER v. MURRAY.

*Costs—Partnership Action—Dissolution—Costs of both Parties Deducted from Assets—Indebtedness of Plaintiff to Defendants—Set-off.*

Motion by plaintiff for an order disposing of the costs of a partnership action.

Arthur Davey, for plaintiff.

J. B. Pattullo, for defendants.

DUGAS, J.:—Plaintiff has brought the present action against the defendants, his partners in trade, for a dissolution and winding-up of the partnership. There was no resistance on the part of defendants, and upon an order of the Court, assented to by all the parties, accounts were taken and a report made thereon.

Digitized by Google

Plaintiff had, before going into partnership with defendants, worked on commission in collecting debts for Murray & Ross, and afterwards for Murray & McGregor, to whom all the interests of Murray & Ross had been assigned, and more particularly the claim against plaintiff for moneys collected by him and not accounted for, so that at the time of the forming of the partnership, plaintiff was indebted in the sum of $5,031.50, as established at the trial upon the counterclaim filed by defendants.

I am now asked to decide whether plaintiff is entitled to his costs of the present action, and, if so, to declare that they should be set off against the personal debt of plaintiff to defendants at the time of the forming of the partnership.

I have looked over the authorities cited by defendants, namely, Ross v. White, [1894] 1 Ch. 326; Giles v. Hamer, 11 Ch. D. 942; also Underhill on Partnership, p. 158; and I find that all only confirm the principle laid down in Lindley on Partnership, pp. 519, 520, which is to the effect that the costs of an action for dissolution are to be paid out of the partnership assets unless there is some good reason to the contrary.

I do not believe that the fact of having a personal indebtedness before the institution of the partnership would be a good reason to depart from that rule. And futher, "that the partnership debts and liabilities, including sums due from the firm to the partners in respect of advances or the like, must be paid out of the assets in priority to the costs."

"The rule," says Kekewich, J., in Ross v. White, "is that the costs of a partnership action are on the same footing as the costs of administration, and, therefore, come out of the subject matter of administration, in other words, the partnership assets."

Whilst there may be a set-off against whatever may be found due to plaintiff upon the assets of the partnership, after due deduction of all which the law orders him to pay, yet I cannot find that this right would exist for any indebtedness of plaintiff towards his co-partners outside of the partnership business.

I was told that defendants would have to pay from their own pockets their share of those costs, and that this would be a hardship upon them inasmuch as plaintiff is indebted to them in such a large amount.

Digitized by Google

I have no doubt that it is, but yet I cannot see that I would be authorized by law to come to their help in that behalf, and, therefore, I declare that the costs incurred by both parties in this action are to be deducted from the assets.

---

## YUKON TERRITORY.

DUGAS, J. MARCH 1ST, 1905.

CHAMBERS.

### CANADIAN BANK OF COMMERCE v. CARBONNEAU.

*Discovery—Security for Costs of — English Rules — Special Provisions of Yukon Rules—Practice.*

Motion by plaintiffs for an order setting aside the order for discovery obtained by defendants on 4th February, 1905, on the ground that defendants have not paid into Court any sum as security for the costs of the discovery thereby ordered.

Frank J. Stackpoole, for plaintiffs.

J. B. Pattullo, for defendants.

DUGAS, J.:—At the argument, Mr. Stackpoole, who represented plaintiffs, argued that the English Rule 368 is in force here, and that defendants were bound to deposit £5 to secure the costs of this proceeding.

By referring to this English Rule it will be seen that this deposit is ordered there when discovery is sought by interrogatories.

At the time the Rules of the North-West Territories were introduced into Yukon Territory, the practice of interrogatories for discovery existed no longer. It was never revived here.

It is contended on behalf of plaintiffs that, notwithstanding, the English Rule above cited has the force of law here, under sec. 3 of our Judicature Ordinance, which reads as follows:

"The jurisdiction of the Territorial Court of the Yukon Territory shall be exercised, so far as regards procedure and practice, in the manner provided by this Ordinance and the

Digitized by Google

Rules of Court, and where no special provision is contained in this Ordinance or in the said Rules, it shall be exercised, as nearly as may be, as in the Supreme Court of Judicature in England as it existed on the 1st day of January, 1898."

The case of Lougheed v. Praed, 1 Terr. L. R. 253, has been cited, but it has no bearing on the point at issue, as then in the North-West Territories such a procedure for discovery was specially authorized by the Rules then in existence.

That portion of the Rule there, just as well as here, having been struck out, the right to proceed to examination for discovery still remained, but in the manner provided by the Ordinance, which establishes a set of Rules and a special provision to attain that end, which thereby make away with the English Rules on the subject.

If the contentions of plaintiffs were admitted, we should have to maintain that all English Rules which are not specially declared not to apply would remain in force in this Territory, notwithstanding any local provision contrary or at variance with the same.

It seems clear that under sec. 3, whenever, to exercise a right before the Courts, a special provision has been established by our Ordinance, it overrides and makes away with the procedure followed in England.

The right of discovery exists here just as well as in England, but, as we have our own machinery to arrive at that end, we are limited thereby and are not subject to the one which exists there.

Without requiring the deposit of £5, our own Rule 203 provides for the payment of the proper fees, which seems to be a substitute for the deposit required in England, when it is preceded by any such interrogatories for discovery.

By the motion plaintiffs have limited themselves to this objection, and this is the only one which I can take under consideration. The motion is, therefore, dismissed with costs in any event to defendants.

Digitized by Google

## YUKON TERRITORY.

DUGAS, J. MARCH 1ST, 1905.

CHAMBERS.

### GOLD RUN KLONDIKE MINING CO. v. CHARBONNEAU.

*Appeal—Security for Costs of—Time for Applying for—Application after Expiry of Time — General Rule Giving Power to Enlarge Time.*

Defendant having appealed from an order made in Chambers, plaintiffs applied under sec. 510 of the Judicature Ordinance, for an order requiring defendant, who had left the jurisdiction of the Court, to give security for costs. The application was not made within 15 days from the service of notice of appeal.

C. W. Tabor, for plaintiffs.

J. B. Pattullo, for defendant.

DUGAS, J.:—Plaintiffs rely upon sec. 555, which reads:—"The Court or a Judge shall have power to enlarge or abridge the time appointed by this Ordinance or the Rules of Court or fixed by any order enlarging time for doing any act or taking any proceedings, upon such terms, if any, as the justice of the case requires, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

This is a Rule which is special to the North-West and to the Yukon Territories. No similar enactment seems to exist in England. It is argued that it give to the Court or Judge in all circumstances the right to enlarge the time for doing any act authorized by the Judicature Ordinance, and that, consequently, it gives the right to a party to apply for security under sec. 510 at any time, even after the 15 days fixed by law have elapsed.

The interpretation which I give to sec. 555 is to the contrary, as it is clear to me that it applies only to those proceedings which have to be taken within a certain time, after which the party would be in default.

Digitized by Google

It is under that Rule that every day applications are granted to enlarge the time to deliver a statement of defence, or reply, or to set a case down for trial, and so on, all of which have to be done within the delays fixed for each respectively. Under sec. 510, the party respondent is not entitled to any security for costs, though he may by reason of special circumstances obtain such a security, but this by a special application which he has to make within 15 days after he has been served with a notice of appeal.

In order to be heard, he must move within that delay. He is at liberty to make or not to make that application, and, if he does not choose to make it within that delay; he loses, it seems, his right to do so. Otherwise he might, even when the Court en banc is seised of the appeal and at any time until judgment is given, seek for such an order, which surely is not contemplated by the law.

Although I consider that the material discloses very favourable grounds for obtaining such an order, if it can be given, I find that plaintiffs are too late, notwithstanding sec. 555, and the motion, therefore, is dismissed with costs to defendant in any event.

---

## YUKON TERRITORY.

DUGAS, J. MARCH 5TH, 1905.

TRIAL.

### RACINE v. McGINNITY.

*Water and Watercourses—Ditch—Mineral Claims — Right to Flow of Water — Easement or License — Acquiescence—Diversion of Water—Injunction—Damages.*

Action for an injunction and damages in respect of the diversion of water by defendants from plaintiffs' mining claims.

Auguste Noel, for plaintiffs.

F. S. Gwillim, for defendants.

DUGAS, J.:—Plaintiffs are proprietors of creek claims Nos. 7 and 8 below lower discovery, on Dominion Creek, and

Digitized by Google

defendants, of a fraction numbered 7A, between the two claims.

The natural course of the creek forms a bend of No. 7A towards the right limit, starting from near the lower line of No. 7 to return, after it has crossed the fraction, towards the left thereof.

In October, 1902, the then proprietors of Nos. 7 and 8, with the consent of the then proprietors of the fraction, defendant McGinnity being one of them, began to build a ditch in a straight line from No. 7, crossing the fraction, and so as to reach the creek again on No. 8.

The work was continued during the spring of 1903, and a dam was built on the fraction, the whole so as to permit plaintiffs to have a better use of the water flowing through their claims.

The cost of the work is proved to have been over $6,000.

The then proprietors of the fraction were present and saw the works which were going on, spoke to some of the plaintiffs or their representatives, as to the way in which it was being done, admitted that they would themselves draw some advantage therefrom, and in all and everything encouraged and acquiesced in what was being done. To that effect there is undeniable proof.

McGinnity seems to have been the principal attendant in the management of that fraction. His co-owners saw what was going on, and the other defendants, who have since become interested with him, had known of the same works, which are so apparent that it was impossible not to notice them.

No interference whatever took place by defendants until May last, 1904, when they proceeded to the construction of a drain so as to render the ditch and dam built by plaintiffs useless, by diverting the water again and forcing it into its first channel.

With those facts it becomes necessary to examine what is an easement, as distinguished from a license, and whether the facts shew one or the other, and with what effect.

I have been referred to a number of authorities bearing upon the case, as they are to be found in Gale on the Law of Easements, 7th ed., pp. 24-70.

In all those cases the effect of acquiescence is discussed.

"There is now," says the author, "a large number of cases in which an agreement to grant an easement or some

Digitized by Google

other right has been inferred, or, more correctly, has been imputed to the person who is in a position to make the grant, on account of some action or inaction on his part. These cases rest on the equitable doctrine of acquiescence; but they may be referred to, for the purposes of classification, as imputed or constructive grants.

"The rule has been variously stated by the Judges as follows:—

"This Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstances of looking on is in many cases as strong as using terms of encouragement.

"To have a work erected at great expense, whether private or public, removed by this Court as a nuisance, the person complaining should have given notice not to proceed, otherwise the Court will leave the complaint to law. . . .

"He who stands by and encourages an act cannot afterwards complain of it, or interfere with the enjoyment of that which he has permitted to be done.

"If a stranger begins to build on my land, supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. . . .

"It will be observed that, to raise such an equity, two things are required: first, that the person expending the money supposes himself to be building on his own land; and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him, and not to the person expending the money in the belief that he is the owner. . . ."

At p. 61 of the same author, the question is put: "What is acquiescence?" "It is an important question, what amount or quality of encouragement or acquiescence is sufficient to give rise to the equity? When the encouragement to expenditure is active, and is accompanied either by an actual representation of the alleged grantor's intention to grant the right claimed, or by a silence which may lead to an expectation that the right will be granted, there is of course no doubt that the agreement to grant will be imputed under the rule, and, even although there be no active encouragement, if one lie quietly by and witness an expenditure which must be thrown away or greatly diminished in

Digitized by Google

value except it be supplemented by the grant claimed, and if there be, to the knowledge of the person so lying by, a misconception on the part of the building owner, then the rule appears to take effect. But if such a notice be given . . . this is sufficient to prevent the equity from arising."

At p. 63: "The extent of the constructive grant is, by virtue of the principle on which the rule is founded, limited by the obvious and plain consequences of the act acquiesced in. For instance, if a neighbour permit me to open a window overlooking his close, he knows the exact consequences of that permission, namely, that he is liable ever after to be overlooked, and that he cannot afterwards so build on his close as to obscure that window; this is the extent of the injury which can be produced, and he cannot say that he did not foresee it." See Bankart v. Houghton, 27 Beav. 425.

At p. 64: "In the Watercourse case, 1710, 2 Eq. Abr. 522, pl. 13, A. diverted a watercourse, which put B. to great expense in laying of sloughs, etc., and the diversion being a nuisance to B., he brought an action; but an injunction was decreed, it being proved that B. did see the work when it was carrying on, and connived at it, without shewing the least disagreement, but rather the contrary."

At p. 65: "Clavering's case, was cited by Lord Loughborough in Jackson v. Cator. He says: There was a case (I do not know whether it came to a decree) against Mr. George Clavering, in which some person was carrying on a project of a colliery, and had sunk a shaft at a considerable expense. Mr. Clavering saw the thing going on, and in the execution of that plan it was very clear the colliery was not worth a farthing without a road over his ground; and, when the work was begun, he said he would not give the road. The end of it was that he was made sensible—I do not know whether by decree or not—that he was to give the road at a fair value."

Other cases are referred to in the same book, which are all to the effect that an acquiescence to build upon another man's property is sufficient to create an easement under certain special circumstances.

In reading the different cases cited from p. 64 to p. 70, in Gale, referred to by the author as bearing directly or indirectly on the acquisition of easements or of rights of a similar nature, one feels that the law on easements never was very clearly settled under them.

Digitized by Google

But the more recent case of Wood v. Leadbitter, 13 M. & W. 838, fully cited at p. 44 of the same text book, makes the law clear on the question of both easements and licenses. . . . "That no incorporeal inheritance affecting land can either be created or transferred otherwise than by deed, is a proposition so well established that it would be mere pedantry to cite authorities in support. All such inheritances are said emphatically to lie in grant, and not in livery, and to pass by mere delivering of the deed. In all the authorities and text-books on the subject, a deed is always stated or assumed to be indispensably requisite:" p. 46.

The four then leading cases of Webb v. Paternoster, Popham 151, Wood v. Lake, Sayer 3, Taylor v. Waters, 7 Taunt. 374, and Wood v. Manley, Vaughan 351, are therein discussed, and reference is made to Lord Chief Justice Vaughan's judgment in the case of Thomas v. Sorrell, as clearly establishing the nature of a license and the legal incidents which make it distinguishable from an easement. . .

Upon reading the lengthy judgment of the Court of Exchequer in Wood v. Leadbitter, and the numerous citations therein made, it is clear that the law is, that no easement can be established except by a grant or a deed, though there may be an equitable right to an easement by agreement and without a deed.

"If, indeed," says Gale, at p. 58, "the agreement be voluntary, equity will not interfere to enforce it; nor will it be enforced as against a purchaser for value without notice, But if there is an agreement to grant an easement for good and substantial consideration, equity considers it (as between the parties to the agreement and persons taking with notice) as granted, and will either decree a legal grant or restrain a disturbance by injunction." . . .

[Reference to Duke of Devonshire v. Eglin, 14 Beav. 530; Moreland v. Richardson, 22 Beav. 596; McManus v. Cooke, 35 Ch. D. 681; Wilmott v. Barber, 15 Ch. D. 105.]

From all this it follows that an easement can be created by a grant, or by acquiescence under the conditions stated in the case of Wilmott v. Barber and Wood v. Leadbitter, or by acquiescence with consideration and part performance, and that a license is revocable at will unless it be coupled with a valid grant, which may be by deed or by parol, according to the nature of the thing granted.

Digitized by Google

Enough has been cited, I think, to make it clear that plaintiffs, in being permitted to divert the stream upon the defendants' claim, did not thereby acquire any interests in the said claim, nor an easement, as they got no deed, and that, according to the accepted principle of the doctrine of acquiescence in the cases cited, plaintiffs do not fall within the rules necessary to establish an incorporeal right of that nature, as they cannot be said to have been under misapprehension as to their legal rights, and that they have made outlays, as proven, on the strength of any mistaken belief.

No doubt McGinnity not only stood by but encouraged the diverting of the stream, yet it is clear that this was only a license which could be exercised only as long as it was not revoked by him or the other owners of the claim.

No consideration was fixed or agreed upon which would make it fall under the equity principle of Duke of Devonshire v. Eglin, above cited.

Notwithstanding this license or permit, defendants remained full proprietors of their claim with the right to use it as such at any time they chose to do so. Plaintiffs had a license to build the ditch in question, but only a parol license, accompanied with none of the conditions which could make it irrevocable as relating to incorporeal hereditament, that is to say, either a deed, or a consideration with part performance, or a wrong belief as to their rights with the knowledge of defendants. The defendants, therefore, were within their rights when they attempted to bring back the water flowing through that ditch to its natural course on their fraction.

True it is that it may be considered a hardship upon plaintiffs to revoke the license granted to them and prevent them from using the stream as diverted, when it is considered that for that purpose they had spent such a large amount of money, yet they have only themselves to blame, since they did not take the proper precautions to protect themselves against the ill-will of defendants at any future date. They should have known to what they were exposing themselves, and in taking the risk, they have to take the consequences.

The action is therefore dismissed, but without recourse for damages, and the injunction is dissolved, the whole with costs in favour of defendants.

Digitized by Google

## YUKON TERRITORY.

DUGAS, J. MARCH 6TH, 1905.

### CHAMBERS.

### CANADIAN BANK OF COMMERCE v. McDONALD.

*Particulars — Action for Account — Postponement till after Discovery.*

Application by plaintiffs for an order requiring defendant McDonald to give particulars of different items of the statement of defence and counterclaim.

Frank J. Stackpoole, for plaintiffs.

Auguste Noel, for defendant McDonald.

DUGAS, J.:—It must be said that the main feature of the pleadings of defendant McDonald repose upon the demand for an account on behalf of plaintiffs, with whom defendant McDonald has had long, heavy, and complicated dealings of different kinds.

Defendant McDonald has agreed to the demand made as to paragraphs A, B, C, D, E, F, H, J, N, but declares that he cannot accede to the demand as to paragraphs G, I, K, L, M, O.

There is no doubt in my mind that plaintiffs are in a better position to know the details required than defendant McDonald himself at the present stage of the proceedings. In this case an account must be taken.

I think it is only doing justice to both parties, relying upon the case of Kemp v. Goldberg, 36 Ch. D. 505, cited in Odgers on Pleading, p. 162, which says, "Merely asking for an account will not prevent the Court ordering particulars, but if the Court sees that an account must be taken it will not order particulars," to postpone adjudicating upon these items till after discovery, and plaintiffs shall be at liberty to renew their demand upon the same application. If further particulars are given, plaintiffs shall have the right to reply. Costs reserved.

Digitized by Google

## YUKON TERRITORY.

DUGAS, J. MARCH 13TH, 1905.

TRIAL.

### McKINNON v. MINATTY.

*Detinue — Contract for Keep of Animals — Dispute as to Terms—Detention—Tender before Action—Counterclaim—Costs.*

Action of replevin.

N. F. Hagel, for plaintiff.

Frank J. McDougal, for defendant.

DUGAS, J.:—This is a replevin action for three dogs which defendant agreed to keep for the summer season of 1904, for the alleged agreed price of $50, on account of which plaintiff declares he has paid $42.50, leaving a balance due by him of $7.50, which he alleges was tendered by him to defendant before this action.

Defendant admits the possession of those dogs, but affirms that the price agreed was at the rate of $4.20 per month for each dog, and he says that they were detained by him because plaintiff had not paid in full the amount due him for the keep of the said dogs, and he files a counterclaim, with particulars, shewing that his claim amounts to $95.76 for the keep of these and other dogs belonging to plaintiff, and claims another $5 for a pair of caribou horns, on account of which he admits having received $42.50, leaving a balance of $58.26.

At the trial I declared that the weight of evidence was in favour of plaintiff's contention, and that defendant could only claim from him the sum of $50 for the keep of whatever dogs he had in his possession belonging to plaintiff. The $7.50, admitted to be due by plaintiff, was not deposited in Court, and the defendant is entitled to it, though I think he cannot, unless for a set-off counterclaim as he did, more particularly for the $5 due as the price of the caribou horns.

This is a matter for the Small Debts Court; however, defendant is entitled to his $7.50, which shall be set off against the plaintiff's costs in this action, which is maintained with costs.

Digitized by Google

THE

# Western Law Reporter

VOL. I. TORONTO, MAY 1, 1905. No. 7.

## YUKON TERRITORY.

DUGAS, J. MARCH 13TH, 1905.

CHAMBERS.

### CARBONNEAU v. LATOURNEAU.

*Execution—Irregularity — Judgment — Amendment — Praecipe—Signature—Motion—Waiver.*

Motion by plaintiffs to set aside execution issued against them for costs.

J. B. Pattullo, for plaintiffs.

Auguste Noel, for defendants.

DUGAS, J.:—I have before me a notice of motion for an order to set aside an execution issued out of this Court, and bearing date 7th September, 1904, to realize the sum of $ , and which I find in the præcipe of execution to be $6,222.39, on the ground that there is no judgment in this Court authorizing the issue of such an execution, and no personal judgment whatsoever in favour of defendants as against plaintiffs for that sum or any sum whatsoever.

This is the amount of a taxed bill of costs ordered to be paid by the Supreme Court of Canada. The judgment, as filed, had omitted, evidently through a slip, to adjudicate those costs against plaintiffs personally, and there was a doubt as to the right of defendants under it. I suspended the proceedings and had the judgment referred back to the Supreme Court, which has since corrected the same by adding that the costs of all the Courts are to be borne by plaintiffs personally.



Digitized by Google

The judgment so corrected has been sent back and is now on file in this Court. As this was a slip, I think that the execution thereunder should stand.

Since this motion was made Messrs. Pattullo & Ridley, appearing as solicitors for the plaintiffs, instead of Messrs. Walsh & McDougal, have given notice of a further motion asking that it be considered as additional and as supplementary to the first one, raising the same points and "also that the præcipes on which said writs were issued are irregular in not containing the requirements set forth in Rule 343 of the Judicature Ordinance of the Yukon Territory, and are not signed by the solicitors of the defendants, as required by the Rule."

I have already expressed my views of the typewritten signatures of solicitors to præcipes and other pleadings.

But, in this case, the first motion, being a step in the cause, is a waiver of the irregularity, and I cannot entertain this part of the second motion.

I observe that this notice of motion seems to refer to several writs, but the præcipe only asks for one writ of execution. I take it that the plaintiffs by their new motion intend to refer to that writ.

The fact of asking that it be considered as an addition or as a supplementary motion cannot be of any avail to plaintiffs, as they cannot in that way cover their own failings.

The motion is, therefore, dismissed, but, in view of the circumstances, without costs.

---

## YUKON TERRITORY.

DUGAS, J. MARCH 13TH, 1905.

**CHAMBERS.**

### LISLE v. DE LION.

*Summary Judgment — Admission of Part of Claim — Division of Claim—Interest—Rule 228.*

Motion by plaintiff for judgment on admissions.

J. K. Sparling, for plaintiff.

R. L. Ashbaugh, for defendant.

Digitized by Google

DUGAS, J.:—Plaintiff sues for the recovery of $7,980 for money lent and for interest agreed to be paid thereon by the defendant at the rate of 24 per cent. per annum, the particulars being as follows:

| | | |
|---|---|---|
| To money lent ..... | $5,000 | |
| To one year's interest, at 24 per cent..... | 1,200 | |
| | | $6,200 |
| By Cash ..... | | 1,200 |
| Reducing the debt again to..... | $5,000 | $5,000 |
| To interest from September 20, 1901..... | 3,550 | |
| Making a total of ..... | 8,550 | |
| Upon which there was paid the sum of..... | 570 | |
| Which leaves the balance claimed ..... | $7,980 | |

Defendant admits the loan and the agreement to pay interest at 24 per cent. per annum, but alleges that on 20th September, 1901, on paying the first year of interest, it was then agreed between both himself and plaintiff that he, defendant, should thereafter pay the interest on the said sum of $5,000 at the rate of 12 per cent. per annum and no more, and that thereby the agreement entered into on 20th September, 1901, to pay interest at the rate of 24 per cent. per annum on the said $5,000 was then and thereby rescinded. He further alleges that the agreement was put an end to and terminated.

Defendant admits that at the time of the commencement of this action there was due by him to plaintiff for principal money and interest the sum of $6,323.75, the defence being as to the contestation about the reduction of the interest which defendant was to pay.

Plaintiff now moves under Rule 228 to have judgment entered in his favour for the amount admitted to be due.

Defendant objects and contends that the action cannot be so divided. I think that the Rule is to the contrary, more particularly, as in this case, a new contract is averred, and judgment is asked for the amount due on the first admitted contract.

There can be nothing embarrassing in permitting the trial to take place upon this contestation of defendant that a new contract was entered into from 20th September, 1901.

Digitized by Google

Several cases have been cited on behalf of defendant, but not one of them bears exactly upon the question. Besides the fact that to my mind the rule leaves no doubt, I find that in Ontario in Crawford v. Gemmell, 7 C. L. T. Occ. N. 117, the same interpretation has been clearly given to a similar enactment.

The motion is therefore granted, and judgment will be entered against defendant for the amount admitted to be due, to wit, $6,323,75, leaving the question of interest to be dealt with at the trial.

Costs reserved until final disposition of the case.

---

## MANITOBA.

DUBUC, C.J. APRIL 18TH, 1905.

CHAMBERS.

### VILLAGE OF CARMAN v. FISHER.

*Criminal Law—Summary Conviction—Municipal By-law—Offence against—Defects on Face of Conviction—Keeping Pool Room Open in Prohibited Hours—Uncertainty.*

Defendant was the holder of a license from the village of Carman to keep a billiard or pool room in the village under by-laws No. 4 and No. 87.

By-law No. 87, amending by-law No. 4, provided that all pool rooms or billiard rooms within the village should be closed from the hour of half-past 8 o'clock in the afternoon of every Saturday until the hour of 7 o'clock in the forenoon on the following Monday, and should remain closed on every other day from the hour of 10 o'clock in the evening until the hour of 6 o'clock on the following morning.

Defendant was, on 28th March, 1905, convicted of an offence under by-law No. 87.

The offence as stated in the conviction was that he "did refuse to close a pool room occupied by him in said village,

Digitized by Google

after the hour of half-past 8, contrary to the by-law of the village of Carman, in that behalf."

An application was made by defendant for a certiorari to remove and quash the conviction, on the ground that no specific offence was stated in the conviction, or in the summons by which defendant was called to appear before the magistrate.

Certified copies of the information, of the summons, of the evidence, and of the conviction, were annexed to the motion paper and placed before the Judge.

F. J. Butcher, for the applicant.

I. F. Brooks, for the village corporation.

DUBUC, C.J.:—The sufficiency of the conviction is objected to on two grounds: (1) It does not state that the alleged offence was committed on a Saturday. On any other day of the week, except Saturday and Sunday, the pool room might under the by-law be kept open until 10 o'clock in the evening.

So, merely alleging that it was kept open after half-past 8 o'clock, without stating that it was on a Saturday, discloses no offence.

2. The conviction says only that the offence was committed "after the hour of half-past 8," without specifying whether it was half-past 8 in the evening or in the morning. Keeping the pool room open after half-past 8 o'clock in the morning is no violation of the provision of the by-law, and no offence.

On account of that omission also, the conviction is defective.

Another point might be raised. The conviction does not state when the offence was committed. Was it committed one week, or one year, or five years before the date of the conviction? Was it committed before or after the by-law came into operation? That does not appear.

On the above grounds, I think the conviction fails to disclose any specific offence and should be quashed, without costs.

Digitized by Google

## MANITOBA.

DUBUC, C.J. APRIL 18TH, 1905.

TRIAL.

### WILSON v. GRAHAM.

*Limitation of Actions—Real Property Limitation Act—Contract for Sale of Land—Covenant for Good Title—Breach—Action for—Damages—Money Charged on Land—Written Contract—Parol Variation—Evidence.*

By an agreement for sale dated 3rd April, 1893, plaintiff agreed to purchase and defendant agreed to sell a certain parcel of land therein described, the consideration being $1,000, payable to the Manitoba Mortgage and Investment Company under a mortgage given by defendant to the company.

In consideration of the payment of the sum of money mentioned, defendant covenanted to convey and assure or cause to be conveyed and assured the parcel of land to plaintiff by a good and sufficient deed in fee simple, with the usual covenants and warranty, freed and discharged from all incumbrances; and the action was brought for breach of this covenant.

There were at the time arrears of interest due on the mortgage and also arrears of taxes.

In addition to that there were certificates of judgment against defendant registered against the land, aggregating nearly $2,000. Seeing that the incumbrances amounted to a good deal more than the value of the land, plaintiff paid nothing on the mortgage. Previous to the date of the agreement, viz., on 23rd January, 1893, the mortgagees had served upon defendant notice of exercising their power of sale under the mortgage, and, after an abortive public sale on 10th May, they sold the land in July by private sale.

In his statement of claim the plaintiff alleged that at the time of the agreement the land was estimated to be worth $2,100; that he delivered to defendant 6 horses valued at $1,100 and assumed the mortgage of $1,000; which two amounts were the consideration given by him for the land.

Digitized by Google

There was no evidence adduced on behalf of the defendant, and the defence relied on was that the right of action was barred by the Real Property Limitation Act, R. S. M. 1902 ch. 100, sec. 24. That section limits to 10 years the time for bringing an action or suit to recover any money secured by mortgage, judgment, or lien, or otherwise charged on or payable out of any land. This action was begun in 1904.

It was also objected on behalf of defendant that the action was brought on a written agreement, and no oral evidence was admissible to vary or alter the agreement as plaintiff was trying to do in setting up the oral agreement about the horses.

C. P. Wilson and F. L. Davis, for plaintiff.

A. Haggart, K.C., for defendant.

DUBUC, C.J.:—Plaintiff's counsel argued that he did not bring his action on the oral agreement respecting the horses, nor even on any covenant to recover money secured on land, but merely on the covenant of defendant for a good title, and what he claimed is damage for breach of such covenant, and, in support of his contention, he relies on the authority of In re Powers, 30 Ch. D. 297. In that case, besides the mortgage given by the mortgagor to secure the sum of £1,000, the mortgagees had taken as additional security a bond given by two other persons, which bond was conditioned to be void if the mortgagor paid the mortgage money and interest. The mortgagees took proceedings to recover the amount secured by the bond. The claim was disputed on the ground that this was a proceeding to recover money secured on land, and was barred by the lapse of 12 years under the Real Property Limitation Act, 1874, sec. 8. It was held that this was not a proceeding to recover money secured on land, but to recover damages because another person failed to pay money secured on land, and that it did not come within the scope of the Real Property Limitation Act, 1874, sec. 8.

It may be said here that the said sec. 8 is the same as our sec. 24, except that the English Act makes the limitation 12 years, while it is 10 years in our own statute.

In Sutton v. Sutton, 22 Ch. D. 511, it was held that the limitation of 12 years imposed by the Real Property Limitation Act, 1874, sec. 8, to actions and suits for the recovery of money charged on land, applies to personal remedy on the

Digitized by Google

covenant in a mortgage deed as well as to the remedy against the land. Lord Justice Fry extended the rule still further in Fearnside v. Flint, 22 Ch. D. 579, where he held that when a mortgage debt is secured by a collateral bond given by the mortgagor, the remedy on the bond is, under sec. 8 of the Real Property Limitation Act, 1874, barred by the lapse of 12 years since the last payment of interest or acknowledgment of the debt, equally with the remedy against the land comprised in the mortgage. He used the following language: "It appears to me that no distinction can exist between a covenant contained in a mortgage deed and a collateral bond given at the same time as the mortgage."

This was referred to approvingly by Bowen, L.J., in In re Powers, supra, where he said, "Lord Justice Fry in Fearnside v. Flint extended the rule to a collateral bond given by the mortgagor, in which I think he was right, for to hold otherwise would be to give an instrument a different effect on account of its not being on the same sheet of paper."

In the present case the covenant, under which plaintiff claims, states that in consideration whereof—that is to say, in consideration of the aforesaid covenants of the plaintiff—and on payment of the said sum of money with interest as aforesaid, in manner aforesaid, the party of the first part covenants, etc. . . . to convey and assure . . . by a good and sufficient deed in fee simple, etc.

The evidence shews that plaintiff did not pay the said sum of money referred to, nor perform his own covenants. It is true that he has given the equivalent by delivering the horses, but this, it is admitted, cannot be claimed in an action based on a written agreement in which no mention or reference whatever is made of the horses, or of the amount representing their value. The real consideration for the covenant of the defendant on which the plaintiff seeks to establish his claim is the payment of the $1,000 secured by the mortgage, and he does not pretend to have paid any portion of it. If plaintiff had paid the $1,000 due on the mortgage and had brought his action to recover the said amount on the covenant of defendant for a good title, for breach of the same, he would certainly come within sec. 24 of the Real Property Limitation Act. Because he did not pay the money, and brings his action by way of a claim for damages for breach of the covenant, can he be considered to be in a better position and entitled to recover? I do not see how

Digitized by Google

his case can be held distinguishable from Sutton v. Sutton and from Fearnside v. Flint, which seem to me to be conclusive on that point. In the latter case the action was not on the deed of mortgage securing money on land, but on a collateral bond between the same parties. Yet, as it was for the same money and the claim arose from the same transaction, it was held that the remedy on the bond was barred by the lapse of 12 years under sec. 8 of the Real Property Limitation Act, 1874.

The claim of plaintiff here is based on the same instrument; the only difference is that it is brought in a different form.

In view of the above authorities I think it comes within the scope of sec. 24 of our Limitation Act, and it is barred by the lapse of 10 years.

There are some Ontario cases such as Allan v. McTavish, 2 A. R. 278, McDonald v. McDonald, 11 O. R. 187, and McDonald v. Elliott, 12 O. R. 98, where a different construction of the statutory provision has been adopted; but, as I said in McLenaghan v. Hetherington, 8 Man. L. R. 357, I think that, where a statute similar to ours has been interpreted by the English Courts, we are bound by the English decisions.

In my opinion, the action should be dismissed with costs.

---

## MANITOBA.

PERDUE, J. APRIL 19TH, 1905.

CHAMBERS.

### RE KNUDSON AND TOWN OF ST. BONIFACE.

*Municipal Corporations—By-law — Closing Street — Private Interest — Absence of Public Benefit — Jurisdiction over Street—Expenditure of Public Money—Dedication by Private Plan—Approval of By-law by Lieutenant-Governor in Council—Promulgation.*

Application to quash by-law No. 257 of the town of St. Boniface, passed on 21st July, 1904.

Digitized by Google

The by-law attacked purported to close "a certain street or blind alley" running north from Marion street, bounded on the west by block 28, on the north end by block A., and on the east by lot 1, block 1, all in parish lot 89, St. Boniface, and shewn on registered plan No. 368.

The by-law also provided that the street so to be closed should be sold to the owners of the land adjoining the same, as follows, to the owners of blocks A. and 28 the most westerly 44 feet of said street at the price of $792, and to the owners of lot 1, block 1, the most easterly, 22 feet in width, for $396, otherwise the land to be sold by public auction or private sale. The street in question was 66 feet wide and was 165 feet in length.

Originally Roger Marion was the owner of parish lot 89, and in 1891 he, conjointly with the owners of the neighbouring properties, had a subdivision made of the land shewn on the plan, and lots, streets, and lanes laid out upon it.

The applicant Knudson purchased the above mentioned lot 1, which fronted on Marion street, and was bounded on the west side by the street in question, the lot extending for the full length of the street. Knudson erected a house on the portion of the lot fronting on Marion street and another house on the rear end of the lot and fronting on the street purported to be closed by the by-law, and the only means of access to the latter house was by this street. The other applicant, S. J. McLaren, was the mortgagee of lot 1.

C. W. Bradshaw and S. E. Richards, for the applicants.

J. Bernier, for the town corporation.

PERDUE, J.:—A large number of objections were taken to the by-law, but all of these need not be dealt with in view of the conclusion at which I have arrived upon the more important of them.

The reason urged on behalf of the corporation for the closing of the street was that it was of no public benefit and was a cause of useless expense. The true reason for the action of the council is to be found in the report of the committee on public works adopted by the council on 10th May, 1904. This report states that the street in question had not been extended northerly by the neighbouring owners, although Marion had an oral arrangement with them to

Digitized by Google

that effect, that it would be equitable to close the street and to return the land to Marion, or pay him the price which can be obtained by a sale. I think the purpose of the council in closing and selling the street was, as indicated by the above, to aid Marion in re-taking the land comprised in it or obtaining the proceeds of a sale of it.

Marion having registered a plan shewing the street in question and having sold to Knudson a lot lying alongside this street, is bound by the plan, and cannot, without the consent of Knudson and others who bought on the faith of the existence of the street, close it up and re-take the land. An intervention by the council to aid him in doing this would be an abuse of the powers conferred on it by the Municipal Act. As it is well expressed by Mr. Justice Osler in Re Morton and City of St. Thomas, 6 A. R. 323, "Corporations are trustees of their powers for the general public, and when they prostitute them for the benefit of one individual at the cost of another, the general public not being interested, their action will be restrained by the Court." See also Pells v. Boswell, 8 O. R. 680.

The council has never assumed charge of this street or expended money upon it. As it had never occasioned any outlay for maintenance, the citizens in general were not interested in closing it.

In October, 1904, the council of the town passed another by-law providing for the opening of a lane 20 feet wide to the rear of the tier of lots fronting on Marion street and a lane of the same width running through the centre of the "blind street" in question, and to acquire the necessary land by expropriation.

The council has therefore passed by-law No. 257 to close the "blind street" and sell the land, and three months afterwards has passed another by-law to open a lane where this street ran and to buy the land for the purpose.

This is sufficient of itself to shew that there was something behind the action of the council in closing the street and that the by-law now attacked was not passed in the public interest. If a lane 20 feet wide was required at this place, surely a street 66 feet wide would serve the purposes of the citizens equally well. In addition to this it may be pointed out that if the proprietors of property abutting on the street carry out the arbitrary provision in the by-law

Digitized by Google

as to the manner in which they may purchase the land, the owner of lot 1 will, when the land is laid out, find himself shut off from access to it by a strip of land one foot in width belonging to another person.

It was also objected that the council had not, in the circumstances of this case, power to pass a by-law for the sale of the street, the council not having assumed charge of the street or expended money upon it.

Under the Municipal Act the corporation is made liable for the repair of a public road only when work has been performed or public improvements made upon it (sec. 667). Until money has been expended or improvements made by the corporation the possession by the corporation is not complete and liability for maintenance has not accrued. Where a street therefore has been simply indicated upon a plan filed in the registry office, but the corporation has in no way recognized it as a public street by improving it or expending money upon it, its dedication as a public highway is not complete, and the council has not perfected its jurisdiction over it. See Re Morton and City of St. Thomas (supra).

By the Municipal Act, sec. 693 (d), power is given to the council to sell any road legally stopped up by the council. I think this provision only applies to original road allowances and to public roads which have been duly dedicated as such, and over which the council has established its jurisdiction. Where a street is simply shewn on a private plan of subdivision, and the corporation has not improved it or assumed liability for its repair, the power to sell given by the Act, does not, in my view, apply.

The by-law attacked has been approved by the Lieutenant-Governor in council pursuant to sec. 694 (c) of the Municipal Act. This has not the effect of making valid a by-law which is otherwise bad.

The by-law has also been promulgated in accordance with sec. 425. The effect of this proceeding is declared by sec. 426, and it appears to me that it simply cures defects in the substance or form of the by-law and in the preliminary steps leading up to the passing of it.

Promulgation would not make valid a by-law not within the proper competence of the council to pass.

Digitized by Google

The sections dealing with it are not to be construed in such a manner as to confer on councils powers not otherwise conferred by the Act. A by-law in the passing of which the council has exceeded its powers, cannot be made valid or within the powers of the council by the simple process of promulgation.

For the reasons I have indicated, the by-law should be quashed with costs to be paid by the town of St. Boniface.

---

## MANITOBA.

PERDUE, J. APRIL 19TH, 1905.

TRIAL.

### MACARTHUR v. HASTINGS.

*Trusts and Trustees—Conveyance of Land to Trustee for Infant—Fraud of Trustee—Conveyance to Creditor as Security—Breach of Trust—Written Declaration of Trust —Oral Evidence to Vary—Notice of Trust—Knowledge of Solicitor—Suppression of Facts—Equities between Innocent Parties—Legal Estate—Charge on Land—Redemption—Costs.*

Plaintiff Duncan Macarthur, being the owner of a tax sale certificate covering a parcel of land in the city of Winnipeg, assigned it to defendant Hastings by an assignment dated 1st November, 1894. At the same time Hastings gave to plaintiff Duncan Macarthur a letter which, after acknowledging the tax sale certificate, proceeded as follows: "And I hereby acknowledge the transfer of said tax sale certificate to me under this date, and that I hold the said land mentioned therein and also said tax sale certificate in trust for one John R. Macarthur, of the city of Winnipeg, in the province of Manitoba."

At that time the firm of Gilmour & Hastings were, and for some time had been, acting as solicitors for Duncan Macarthur. Owing to the failure of the Commercial Bank of Manitoba, Macarthur was in financial difficulties, and was indebted to a number of persons, amongst whom was John

Digitized by Google

R. Macarthur, above named, who was his son and who was at that time a minor. The object of the trust was to procure a tax deed for the benefit of John R. Macarthur, and as a security.

As he was under age it was arranged that Hastings should procure the tax deed and hold it in trust for him.

A tax deed was issued to Hastings by the city of Winnipeg on 13th February, 1895, in pursuance of the tax sale and assignment to him, Duncan Macarthur paying to the City $178 as the balance of the purchase money payable on application for the tax deed. Upon the day on which the tax deed issued a letter was written to Duncan Macarthur by Gilmour & Hastings, stating that application had been made for a Torrens title to the land, that a tax deed had been issued to Hastings, that the application for the Torrens title had been made by him, but that they had registered a deed from Hastings to Peter Macarthur so that the certificate of title would issue to the latter. Peter Macarthur was a brother of Duncan Macarthur and was intended to have been the trustee in the first place, but, owing to the distance of his residence from Winnipeg, Hastings was substituted. Subsequently it was arranged that the land should be conveyed to Peter Macarthur so that he might carry out the trust. Notwithstanding the statement in the letter no deed appeared to have been executed in favour of Peter Macarthur, and no such deed was, at all events, ever registered. The title remained in Hastings up to the year 1897, when, by deed bearing date 12th March of that year, he conveyed the land to his co-defendant, Alice E. Stenning, as part security for an indebtedness to her in respect of moneys he had received from her for investment.

At the time of the conveyance to Mrs. Stenning no certificate of title had been issued, but Hastings on 27th June, 1897, filed the deed in the Land Titles office as a direction to the District Registrar to issue the certificate to her. Shortly afterwards she placed the securities in the hands of W. J. Tupper and instructed him to take charge of her affairs. Tupper procured a certificate of title to issue to her, and the title stood in her name at the date of the trial. It was admitted, however, that she held the land in the first place simply as security for the debt of Hastings.

In April, 1899, an agreement was entered into between Mrs. Stenning and Hastings whereby the latter purported to

Digitized by Google

release all his claim to the land and to grant to her his interest therein in consideration of $460, which sum was to be credited on the indebtedness to her. At that date she was still in ignorance of any claim on the part of the plaintiffs.

During all this time Mrs. Stenning believed the land to be vacant, but as a matter of fact there was a building upon it, occupied by a tenant, who paid rent to a real estate agent, the latter accounting for it to Macarthur. The land was valued at about $2,000.

The action was brought by Duncan Macarthur and John R. Macarthur against Hastings and Mrs. Stenning to have the deed and certificate of title in her favour set aside, or that she be declared a trustee for John R. Macarthur.

C. W. Bradshaw and R. G. Affleck, for plaintiffs.

G. A. Stewart Potts, for defendant Hastings.

C. P. Wilson and J. F. Fisher, for defendant Stenning.

PERDUE, J.:—It was sought to put in evidence at the trial to shew that the land was held by Hastings upon trusts other than that set out in the written declaration of trust. I refused to allow oral evidence to be given to contradict the written evidence of the trust. I find that Hastings received the assignment of the tax sale certificate on the terms mentioned in the letter of 1st November, 1894, and not otherwise.

It was argued strongly for plaintiffs that Mrs. Stenning was fixed with notice of the trust through Hastings, who was acting as her solicitor, and who, as such, prepared and filed the deed. In ordinary transactions the knowledge of the solicitor in respect of a matter passing through his hands is the imputed knowledge of his client. If a solicitor knows a material fact respecting a title, such as a prior incumbrance, it is assumed that he will communicate this fact to the client, and consequently the client is fixed with notice. See Espin v. Pemberton, 3 De G. & J. 547; Le Neve v. Le Neve, 3 Atk. 646; Rolland v. Hart, L. R. 6 Ch. 678; Bradley v. Riches, 9 Ch. D. 189. Where, however, the circumstances of the case shew that the solicitor in the very transaction intended a fraud which would require the suppression of the knowledge of the material fact from the person on whom he was committing the fraud, then notice is not to be imputed

Digitized by Google

to such person. This is substantially the way in which the law as to this is stated by Lord Hatherley in Rolland v. Hart, L. R. 6 Ch. 678. See also Cave v. Cave, 15 Ch. D. 639; Thompson v. Cartwright, 33 Beav. 178.

The facts in the present case establish that the deed to Mrs. Stenning was made and filed in breach of the trust upon which the land was held. To make her satisfied with the security offered it was necessary to suppress all knowledge of the trust. I must, therefore, hold that she was not fixed with notice of it.

Then it was urged that the documents themselves filed by Hastings on making the application in the Land Titles office disclosed matters which should have put Mrs. Stenning or her solicitor upon inquiry. I fail, however, to see that there was anything of a supicious nature upon the face of the documents, or anything which would require a solicitor to probe more deeply into the transaction. Nor can I hold that the fact that the land was occupied by a tenant who was paying rent to Macarthur's agent, was, in the absence of actual notice of the fact that the tenant was so paying rent, constructive notice to Mrs. Stenning. This appears to be clearly settled by Hunt v. Luck, [1902] 1 Ch. 428.

Upon the other hand one can easily understand why Macarthur failed for so long a time to discover the breach of trust. He had a letter from the solicitors who had charge of the matter for him stating that a deed to his brother had been registered and that the certificate of title would issue to the latter. His agent was in receipt of the rents, and there was nothing to rouse his suspicion until he heard that some one else had paid taxes on the land. Taking into account all the facts disclosed, the plaintiffs and Mrs. Stenning appear to be equally innocent parties. Both of them intrusted their property to the same person and both suffered through his actions. The equity of the Macarthurs is prior in time, but Mrs. Stenning has the legal estate. The fact that she has obtained a certificate of title does not, for the reasons I gave in Barnes v. Baird, 25 C. L. T. Occ. N. 20, improve her position under the deed. I must, however, treat her as a purchaser for value without notice of plaintiffs' claim. She was pressing Hastings to restore her money, and she was induced by him to take this land as one of the securities offered for the debt and to abstain from taking further proceedings. She afterwards by the agreement of

Digitized by Google

April, 1899, fixed the value of this security at $460, and gave credit to Hastings for this amount. This, I think, was sufficient to constitute her a purchaser for value without notice. See Moore v. Kane, 24 O. R. 541. Being such and having the legal estate, she is entitled to prevail over the plaintiffs' prior equity, to the extent of the moneys she has paid, or the credit she has given, in ignorance of their rights: Kerr on Fraud, p. 324.

I cannot, however, find that there was any new or further consideration for the release of the equity of redemption contained in the agreement of April, 1899. The transaction appears to have been simply this. The land was taken by Mrs. Stenning in the first place as one of a number of general securities for her claim; no amount being mentioned as specially chargeable on this particular property. Subsequently, this land by arrangement between her and Hastings was valued at $460, and was taken by her as security for that amount, Hastings being released to that extent, but remaining liable for the balance of her claim, which he appears to have eventually settled in full. At the time this valuation was arrived at, he, no doubt, pretended to release the equity of redemption in the land, but no valuable consideration was paid for the release. The only valuable consideration to support the whole transaction as against plaintiffs was the indebtedness of Hastings to Mrs. Stenning in the first place and the extension of time given him. After the conveyance of the land to her, plaintiff John R. Macarthur, as cestui que trust, was entitled to come in and redeem by paying her claim. He could not be deprived of this right of redemption while the land remained in her hands unsold, unless it was shewn that she subsequently, in ignorance of his rights, purchased it for value from the trustee.

As no new valuable consideration was paid, he is now entitled to say to her, "I am compelled to admit your charge upon the land, but, as Hastings has satisfied this charge except the sum of $460, which you have placed against the land, I claim the right to receive back my property upon paying you this sum and interest and any other outgoings and expenses legally chargeable against it."

It was argued on behalf of Mrs. Stenning that the action of Macarthur in assigning the tax sale certificate to Hastings



Digitized by Google

enabled the latter to act as he did, and that this was negligence which disentitled plaintiffs to relief. But, as pointed out by Lord Cairns in Shropshire, etc., Co. v. The Queen, L. R. 7 H. L. 507, a man has a right to take or to place a security in the name of another person, and having done so he should not have negligence imputed to him for not watching his trustee. Besides, the minority of John R. Macarthur was a good and sufficient reason for the intervention of a trustee in the first instance.

There will be judgment declaring plaintiff John R. Macarthur entitled to redeem the land upon paying the defendant Mrs. Stenning the sum of $460 with interest at 6 per cent. from 5th April, 1899, to 7th July, 1900, and at 5 per cent. thereafter, together with any moneys paid by her for taxes and interest at the same rate thereon, and her costs of suit. There will be judgment against defendant Hastings in favour of plaintiff J. R. Macarthur for the amount so found due to Mrs. Stenning. Hastings must also pay plaintiffs their costs of suit. There will be a reference to the Master to take an account of the amount due and to appoint a day for redemption.

---

## MANITOBA.

RICHARDS, J. APRIL 28TH, 1905.

TRIAL.

### McKENZIE v. KAYLER.

*Nuisance—Livery Stable—Neigbouring Dwelling Houses—Business Part of City—Transition Stage—Parties—Action by Owner of Houses—Addition of Tenants as Plaintiffs—Injunction or Damages.*

The owner of a terrrace containing 6 dwelling-houses, occupied by his tenants, brought this action to restrain the defendants from so carrying on their business of livery and feed stablekeepers in an adjoining building as to cause a nuisance to the occupants of the terrace and to injure the terrace itself.

A. J. Andrews and H. W. H. Knott, for plaintiff.

I. Campbell, K.C., and C. P. Wilson, for defendants.

Digitized by Google

RICHARDS, J.:—After the hearing I allowed John Cameron, the tenant of the second house from the stable, and T. A. Montgomery, tenant of the fifth house from the stable, to be added as co-plaintiffs with the owner, as was done in Broder v. Saillard, 2 Ch. D. 692. Thereafter further evidence was given on both sides, and the case was further argued.

The terrace faces on the east side of Garry street in Winnipeg. Its northerly end adjoins the southerly limit of Graham avenue. The stable is also on the east side of Garry street, and its northerly side almost touches the southerly end of the terrace.

Except the stable and an apartment building, all of the buildings in the block in which the terrace stands are dwelling-houses. By the term "block" I mean both sides of the same street lying between two next adjoining cross streets.

There are several other livery stables in the neighbourhood. One is on the west side of Garry street in the block north of that on which the terrace stands. Others are on streets near Garry. No one of them is near enough to the terrace to cause discomfort to its tenants.

It was proved that, as a result of Garry street being thought likely to become a business street in the future, land on both sides of the street, in the block where the terrace and defendants' stable are, commands a price much greater than is ordinarily paid for land to be used as residence property.

A number of witnesses testified that there is an intermediate stage between the residence and business stages of a street, saying that though business houses might not have so come into such a street as to make it a business one in fact, yet prices of land on it, owing to its probable future as a business street, brought it into temporary use for boarding houses and livery stables, which brought a better rental than any other than business premises, which would again disappear to make way for actual business premises as the advance of the street on business lines warranted their erection.

On that evidence defendants' counsel based the argument that the prices of land in the block in question justify the carrying on of defendants' livery stable business at the place in question.

That argument seems fallacious, as it implies that because land in a block of residences has acquired a speculative value

Digitized by Google

or price higher than is obtainable for residential property, it is, in spite of those residences continuing to be occupied as residences, to be treated as having ceased to be a residential district.

There is no doubt that the nature of the occupancy of a locality may be a large factor in deciding whether the carrying on of certain trades there would, or would not, create a nuisance.

But, in so deciding, the locality must, I think, be taken as such occupancy exists, and not as what it may become when the nature of such occupancy changes, even though there may be good reason to suppose that a change will occur in the near future.

The holdings of the tenants in the terrace are from month to month.

It was stated in Jacomb v. Knight, 3 De G. J. & S. 533, that owing to the possible shortness of his tenure a tenant from year to year seeking to restrain a nuisance must make a strong case, if the inconvenience that would result to the defendant from the granting of the injunction, would be serious.

In the present action I think a strong case has been made by plaintiffs Cameron and Montgomery, and, though their tenures are only from month to month, it seems to me that they are entitled to maintain this action. In Jones v. Chapple, L. R. 20 Eq. 539, Sir George Jessel held that a tenant from week to week was, when joined with the owner, entitled to bring an action to restrain a nuisance.

It is not certain that injury might not ultimately result to the structure of part of the terrace from the use of the stable, but none has yet been satisfactorily proved to have happened. It has not been shewn that any tenants have left the terrace because of the annoyance from the stable.

But the evidence clearly establishes that the smell and noises from the stable disturb the comfort and sleep of the occupants of the houses in which the plaintiffs Cameron and Montgomery reside, and cause them special annoyance and discomfort and prevent their reasonable enjoyment of their residences.

It was suggested by defendants' counsel that in the event of finding against the defendants this would be a proper case

Digitized by Google

for damages rather than for an injunction, owing to the uncertainty of the length of time that the tenant plaintiffs may continue to occupy their dwellings, and to the loss that would be caused to the defendants, if compelled to stop their business or remove their building to another locality.

But injuries of the kind in question are not fully compensated by damages.

To grant damages instead of an injunction is to compel parties against their will to sell their rights at a price fixed by the Court, and that course should be taken with hesitation.

Then, owing to the tenancies being from month to month, it is impossible to fix compensation for the injuries that the tenants would suffer while occupying their present abodes. They may remain for years, or they may leave, on a month's notice, at any time. So that their damages cannot be estimated in advance, and there has been no evidence to guide in estimating damages for any fixed period. What might be full compensation to one would be no sufficient recompense to another, as some suffer more than others from such annoyances as smells and noise. The giving of damages would not protect the defendants against action by other tenants of the terrace, or by owners or occupants of other property near enough to suffer discomfort or injury, or against a future action by the owner of the terrace, if damage should be done to its structure, or if his tenants should leave the terrace on account of the stable.

The defendants, before building their stable, had distinct notice that an action would be brought to enjoin them, if they should use it as a livery stable. The notice was given by the owner only. But the rule that the owner not in possession cannot take action, except in case of injury to his reversion, is more technical than meritorious.

I think the defendants had reason to expect this action in the form it has developed into, and knowingly took the risk. That is a further reason why the plaintiffs' remedy should not be lessened.

There will be judgment that the defendants be enjoined from so conducting their business on their stable premises in question as to occasion a nuisance to the plaintiffs Cameron and Montgomery, or to either of them, or to the families or lodgers of either of them, this injunction to continue during

Digitized by Google

the occupation by the plaintiffs Cameron or Montgomery, or either of them, of their or his present holding, and to be without prejudice to the rights of other or future tenants, or of the owner, to take action at any time in the future if otherwise entitled to do so. As the action was originally brought by the owner alone, there will be no costs to either party of any proceedings prior to the further hearing, had after Cameron and Montgomery were added as co-plaintiffs; the costs of that further hearing and subsequent costs are to be paid by the defendants to the plaintiffs.

No proceedings to enforce the injunction are to be taken for 14 days after formal judgment is entered. If during such 14 days an appeal is taken to the full Court, the operation of the injunction is to be suspended till that appeal shall be disposed of, provided that defendants conduct their business in the meantime with as little annoyance to plaintiffs Cameron and Montgomery, and their families and their lodgers, as is reasonably possible, and also provided that they bring their appeal on for hearing with all reasonable expedition. Leave is reserved to plaintiffs or any of them to move at any time to remove such stay on shewing any proper ground for such removal.

---

## BRITISH COLUMBIA.

### (VICTORIA.)

APRIL 15TH, 1905.

FULL COURT.

### MORGAN v. BRITISH YUKON CO.

*Master and Servant—Injury to Servant—Negligence—Ship—Bursting of Capstan — Defect—Notice—Defective System —Superintendent—Competence of—Common Law Liability —Aggravation of Injuries by Subsequent Conduct—Master of Ship—Scope of Authority—Delay in Transport.*

Appeal by defendants from the judgment of DRAKE, J., in favour of plaintiff for $12,000, upon the general verdict

Digitized by Google

of a jury, in an action for damages for personal injuries sustained by plaintiff owing to the alleged negligence of defendants.

R. Cassidy, K.C., for defendants.

W. J. Taylor, K.C., and R. T. Elliott, for plaintiff.

The judgment of the Court (HUNTER, C.J., IRVING, J., DUFF, J.), was delivered by

HUNTER, C.J.:—This was an action for personal injuries received by plaintiff while acting as mate on the steamer "Yukoner," owned by defendant company, the jury finding a general verdict for plaintiff for $12,000 damages.

The claim was two-fold: first, for the injuries caused by the bursting of the steam capstan; and second, for aggravation of the injuries owing to the unauthorized detention of plaintiff on board the "Yukoner," which, after some delay caused by stranding, arrived at White Horse some days after the accident, plaintiff alleging that defendants had undertaken to remove him to Dawson, and they alleging that he had changed his mind and desired to go to White Horse.

After the "Yukoner" had stranded, and while plaintiff and others were engaged in trying to get her off with the aid of the capstan, the capstan burst and injured plaintiff's leg. Whether the jury considered that it burst by reason of some inherent defect, or by reason of its not having been set firmly on the deck, or because it was too roughly handled by jerking it, or because too much steam was turned on, or from some other cause, can only be conjectured, as they found a general verdict for plaintiff, and declined to answer the special questions submitted. On the previous trip it had been used to assist the "Mary Graff" in getting off a bar, and had sprung a little from the deck but settled back in place. The capstan was then examined by the second engineer, who was in charge, and as a result of the examination he considered that nothing was required to be done. Shortly after the accident, plaintiff was put on board a skiff and taken to the "Bonanza King," another vessel belonging to defendants, bound to Dawson, in pursuance of a request by plaintiff to be sent to Dawson. The "Bonanza King" also grounded about a quarter of a mile below the "Yukoner." The purser of the "Yukoner" then went on towards Selkirk to get a surgeon,

Digitized by Google

and came across him on the "Victorian," bound up-stream, and that vessel returned to Selkirk to procure the necessary instruments and reached the "Bonanza King" about 9 hours after the accident. Plaintiff was transferred to the "Victorian," which, after getting off the "Bonanza King," went on up and released the "Yukoner," to which plaintiff was returned, and by her taken to White Horse, because, as defendants alleged, he changed his mind and preferred to be taken to White Horse rather than Dawson, as he would be able to get outside more quickly if he desired. Plaintiff alleged, on the other hand, that he did not consent to go to White Horse, but always wished to go to Dawson, and that he was given opiates on board the "Bonanza King" and taken back without his consent to the "Yukoner." Between the delays caused by the journey to White Horse and plaintiff's refusal to have the leg amputated before he got to White Horse, the surgeon having informed him as soon as he examined it that such operation was necessary, his injuries were much aggravated, and in the end he was compelled to sustain a more serious operation than he otherwise would have been, while it is possible that if he had been taken to Dawson no operation would have been necessary, as some surgeon there might have saved the limb.

Being a common law action, in order to succeed on the first branch of the claim, plaintiff had, among other things, to prove that defendants were guilty of negligence in failing to keep the capstan in a good state of repair, as it would be impossible on the evidence to sustain a finding that it was originally insufficient, the capstan being of a well-known make and having been used two or three seasons without mishap until the "Mary Graff" incident, which took place on the second last trip of that season.

In order to make out a case of negligence by defendants, it must appear either that defendants had a defective system which did not bring home notice of the defect to some person authorized to see to its proper repair, or if the system did provide for notice to such person, that he was notified and failed to have the defect remedied, and that he was not a co-employee of plaintiff, but the representative of defendants.

In my opinion, a finding that the system was defective could not be maintained, as it was sworn and not contradicted that engineers' logs were kept in which anything in the way of an accident or any useful information was entered and

Digitized by Google

used, in the form of trip reports, to Sproat, the superintending engineer of defendants at White Horse; indeed it is obvious that defendants' steamers could not be managed without such a system, as a sound capstan is just as necessary to vessels on the Yukon as a rudder. In fact, no attempt was made by plaintiff's counsel to challenge the sufficiency of the system. In any event, the second engineer, Vey, who was the engineer then in charge, testified, as already stated, that immediately after the "Mary Graff" incident he inspected the capstan and considered that everything was all right. But, even assuming that this evidence was not to be believed, and that he did report the matter to Sproat, and that Sproat was negligent, I think it is quite clear that his negligence, if any, was not that of defendants, as he was not the representative of defendants, but an employee, and subject to orders equally with the captains and mates. And, if Sproat was negligent, there was nothing to shew that he was incompetent to the knowledge of defendants; on the contrary, what evidence there was went to shew that he was competent, as he held an English Board of Trade certificate, and had about 14 years' experience with stern wheel steamers, and it is well settled that the master is not liable for the negligence of a competent servant at common law.

As to the second branch of the case, i.e., the complaint based on the aggravation of his injuries, I think plaintiff is again out of Court.

In his statement of claim plaintiff says that after the accident the defendants, by the master, undertook to carry him to Dawson, but not having done so they are liable in damages for the breach. The evidence in support of this allegation was that of plaintiff himself. He said that to the captain's inquiry as to what was best to be done he answered, to get him to Dawson as quick as he could and not take him up-stream, and that the captain replied that was the best. I do not think, on the fair construction of this evidence, assuming that it was an accurate statement of what took place, that the captain ever intended that he should obligate either himself or the company to get plaintiff to Dawson, or that any reasonable person could infer that he so intended; but rather that it was the expression of a natural desire on the part of a humane man to do all in his power to aid an injured member of his crew. If, in such circumstances, a Court or jury were to spell out a contractual obligation bind-

Digitized by Google

ing on either the captain or defendants, those in command would soon learn to be silent and inert in the presence of suffering. But, even assuming that any jury could reasonably find that the captain had so expressed himself as to lead plaintiff to believe that defendants were assuming responsibility for his carriage to Dawson, and to act on the belief, I think it is clear that for the captain to give such an undertaking would not be within the scope of his authority. There is no legal obligation on the owners of an inland vessel to provide medical assistance for the crew, or to carry or forward a disabled seaman to any port which he may indicate, and for the captain to engage to do so on behalf of the owners is clearly to do something which is not within the ordinary course of his employment. If, however, the captain wilfully or wrongfully prevents the disabled seaman from getting medical assistance at such place as he desires he would no doubt be personally liable. But little stress, however, was laid by the learned counsel for the respondent on this alleged undertaking, and, in my opinion, plaintiff's case on this head amounts at most to a complaint that there was an unauthorized interference with his person on the part of the captain. For that, however, defendants are not liable, as such an act would be clearly outside the scope of the former's employment, and it cannot be contended that the telegram of Scharschmidt (assuming that he was the representative of defendants) amounted to a direction to the captain to take possession of plaintiff's person against his will. If, however, this branch of plaintiff's case can in any sense be regarded as grounded on any negligence on the part of the captain, then it is clear, on the authority of Hedley v. Pinkey, [1892] 1 Q. B. 58, [1894] A. C. 222, that defendants are not liable.

Finally, if we are to be guided by the principles underlying the common law doctrine of common employment, the complaint as to the injuries being aggravated by the delay in transport must fail, as that was one of the risks incident to the service, plaintiff being still an employee of defendants.

Plaintiff has, no doubt, without any fault of his own, sustained grievous injuries through a series of untoward events, but not by reason of any person's act or default for which defendants are liable at common law.

The appeal should be allowed with costs here and below.

Digitized by Google

## BRITISH COLUMBIA.

### (VICTORIA.)

APRIL 15TH, 1905.

FULL COURT.

## ATTORNEY-GENERAL FOR BRITISH COLUMBIA v. CANADIAN PACIFIC R. W. CO.

*Constitutional Law—Foreshore of Vancouver Harbour—Occupation by Canadian Pacific Railway—Powers of Dominion Parliament—Terms of Union—Public Rights of Way.*

Appeal by plaintiff from judgment of DUFF, J., of 30th July, 1904, dismissing an action brought by the Attorney-General, on the relation of the corporation of the city of Vancouver, against the Canadian Pacific Railway Company, for a declaration of the public right of access to the waters of Vancouver harbour through certain streets in the city of Vancouver.

The appeal was heard by HUNTER, C.J., MARTIN, J., MORRISON, J.

The Attorney-General (C. Wilson, K.C.), in person.

E. Bloomfield, also for the Attorney-General.

E. P. Davis, K.C., for defendants.

HUNTER, C.J.:—I agree with the judgment of the trial Judge.

He has found as a fact that the locus in quo formed part of the harbour at the time of Union, a finding which, in my opinion, it is impossible to disturb. But, even if it did not form part of the harbour until after the Union, and even if Vancouver harbour did not exist as such until after the Union, I have no doubt that the jurisdiction of the Dominion attached as soon as it did exist.

In my opinion, the B. N. A. Act assigns public harbours to the Dominion not so much qua property or land as qua harbours, i.e., it was rather a transfer of jurisdiction than of property. The public works forming part of a public harbour, as well as the bed of a harbour, are and always have been vested in the Crown, and it was, no doubt, considered advis-

Digitized by Google

able, if not actually necessary, to transfer the jurisdiction, executive and legislative, over public harbours to the Dominion as ancillary to the proper exercise of its powers relating to shipping and navigation. The jurisdiction, in my opinion, is latent, and attaches to any inlet or harbour as soon as it becomes a public harbour, and is not confined to such public harbours as existed at the time of Union. At the same time I would not be understood as holding that the subsoil of a public harbour is or becomes vested in the Dominion usque ad centrum: it is vested only so far as it is necessary for the proper management of the harbour, much after the same mode in which streets are commonly vested in municipalities. For example, I think that the beneficial interest in a copper mine underlying a public harbour would belong to the Province or its grantee, subject to the right of the Dominion to dredge or otherwise improve the harbour.

Assuming, however, that these views are not sound, and that the learned trial Judge was in error in finding that the locus in quo formed part of the harbour, I am of opinion as at present advised, and the recent decision of the Privy Council in City of Toronto v. Bell Telephone Co., [1905] A. C. 52, points to the conclusion, that the Dominion could, in the exercise of its power to make laws relating to railways, authorize such railway to cross any public lands whether Imperial, Federal, or Provincial. Provincial rights were created by the same power which conferred exclusive jurisdiction on the Dominion Parliament in relation to certain classes of railways, and the latter was, in my opinion, given plenum dominium to provide for the expropriation of all estates, rights, or interests, whether Imperial, Federal, or Provincial, public or private, in any lands whatever so far as may be necessary to the proper exercise of its jurisdiction in relation to railways. I say necessary, because, for example, I would not be understood as assenting to the suggestion that the Dominion could under colour of its power to legislate regarding railways deprive the Province of its beneficial interest in the public lands.

On the other hand, it has never been doubted, so far as I am aware, that Parliament, in the exercise of its railway jurisdiction, may provide for the expropriation of such private interests in land as may be required for railway purposes. If the interest of one man may thus be taken, then why may not Parliament do the same in the case of lands the

Digitized by Google

beneficial ownership of which is in the inhabitants of a Province collectively, i.e., Crown lands? and if expropriated, why not taken without compensation? Which latter, however, would be a question only of policy and not of jurisdiction. So far as I can see, the constitution confides the power of legislating as to these matters not to the people in their provincial capacity, but to the people in their federal capacity, for to say that a Dominion railway, although authorized so to do, could not traverse public lands vested in the Provinces without their consent, would be to paralyze the power of the Parliament, and I feel unable to hold that one of the most important powers possessed by Parliament can be exercised only with the sufferance or consent of the legislatures or the Provincial executives, when I find nothing in the Act compelling me to such a conclusion. If that is the position, then the Dominion could not build a telegraph line across our northern wilderness if a single province chose to object to the post holes, and the Union would be little better than a rope of sand.

But, independently of these grounds, I think the learned Attorney-General must fail in any event, on the ground that by the terms of Union the Government of Canada were obliged to secure the construction of the railway to the seaboard of the Province, and, by virtue of the Imperial order in council admitting the colony into the Union, this obligation became part of the organic law of the land. It could not legally have been nullified even by the joint consent of Canada and the Province without the sanction of the Imperial Parliament, and for the Province or any one purporting to represent the Province to have hindered or resisted the construction would have been to set at naught the mandate of the Imperial Parliament, and violated the constitution of the country. Nor does it help the learned Attorney-General to contend that because the grant made by the Province to the Dominion Government in pursuance of the terms of Union did not extend west of Port Moody, the terminus originally selected, the railway could not be built west of that point on Provincial lands without the concurrence of the Province. The mandate was to build to the seaboard, and not to any particular point on the seaboard, and it seems too clear for controversy that the Government of Canada had the power to select any point on the seaboard, and that the power was not exhausted merely because a point was reached on the seaboard before the final completion of the railway.

Digitized by Google

It is not, however, necessary to enter into any of these larger questions in extenso, as, in my opinion, the present case does not require their decision. The suggestion of the learned Attorney-General that, even if the Dominion had power to authorize the company to build on the foreshore, Parliament could not at any rate extinguish public rights of way, cannot be maintained, the short answer being that the public is just as much represented in Parliament as it is in the legislature, and that body may extinguish any rights, public or private, in the proper exercise of the law-making powers intrusted to it.

In my opinion, there are numerous obstacles in the path of the learned Attorney-General in this action, any one of which is insurmountable, although I grant if there is a grievance there is a remedy—not in this Court but at Ottawa: ubi jus ibi remedium not ubi damnum. The appeal should be dismissed.

MARTIN, J., agreed that the appeal should be dismissed, for reasons which he set out at length in a written opinion.

MORRISON, J.:—I agree with the judgment of my brother Martin.

---

## BRITISH COLUMBIA.

### (VANCOUVER.)

APRIL 15TH, 1905.

FULL COURT.

## PECK v. SUN LIFE ASSURANCE CO. OF CANADA.

*Lis Pendens—Registration of Certificate—Cloud on Title—Action to Set aside—Action still Pending after Judgment—Lis Pendens Affecting Equitable Interest in Land—Land Registry Act, B.C.—Vendor and Purchaser—Vendor's Lien—Charge on Land—Fraudulent Conveyance—Notice—Bona Fide Purchaser for Value—Declaratory Judgment—Costs.*

Appeal by defendants from judgment of IRVING, J., in favour of plaintiffs in an action to vacate the registration of a certificate of lis pendens against land conveyed to plaintiff

E. Bloomfield, for defendants.

R. L. Reid, for plaintiff.

Digitized by Google

The judgment of the Court (HUNTER, C.J., MARTIN, J., DUFF, J.), was delivered by

DUFF, J.:—Defendants are creditors of Henry Elliott, deceased. In 1894 Henry Elliott conveyed certain lands to Ellen Elliott, his wife, and from her, by agreement dated 28th October, 1896, and registered 7th March, 1897, plaintiff contracted to purchase one parcel of the land. The agreement provided that the purchase money, $3,000, should be paid in instalments, $500 at once, and the balance in monthly payments of $30 each. The purchase money was paid in accordance with those terms until November, 1898. In that month, plaintiff having under a fresh arrangement paid a sufficient sum to reduce the unpaid balance of the purchase money to $1,000, Ellen Elliott accepted his promissory note for that balance, and executed a deed conveying to him the parcel sold.

On applying to register his title, plaintiff for the first time discovered that subsequent to the registration of his contract of purchase (on 25th August, 1897), defendants had commenced an action against Mrs. Elliott claiming a judicial nullification of the conveyance to her from her late husband as a fraud on his creditors. This action was registered as a lis pendens on 24th September, 1897; it reached its final conclusion in a judgment of the Supreme Court of Canada, pronounced on 27th June, 1901, by which the relief prayed was granted, and Mrs. Elliott was directed to do all acts necessary to make the lands comprised in the impeached conveyance (including plaintiff's land) available to satisfy the claim of her husband's estate.

In the present action, which was begun in November, 1903, plaintiff complains of the registration of defendants' action as a lis pendens, which is noted as an incumbrance on his certificate of title, and claims to have the registration vacated. At the trial before Irving, J., judgment was given for plaintiff in accordance with his claim, and defendants now appeal from that judgment.

Before discussing the substantial question which the appeal presents for determination, it will be convenient first to deal with the claim as put forward on the pleadings.

On the argument plaintiff's counsel sought to support the action on two grounds. First, he argued that, defendants' action having been pursued to final judgment, there is no lis

Digitized by Google

which can affect the land sold to plaintiff. To this the somewhat obvious answer is that the direction to which I have referred requiring Mrs. Elliott to bring the property affected by the judgment into the administration of her husband's estate has not yet been complied with, and so long as there remains anything to be done to work out the judgment pronounced in the action, the action is pending. True, alienations of the subject matter of an action made after final judgment do not fall within the doctrine of lis pendens, for obvious reasons; but in this case the only alienations with which we are concerned were made prior to final judgment, and plaintiff's contention in effect is, that, by recovering judgment in their action against Mrs. Elliott, defendants lost their right (which subsisted so long as the action was undetermined) to hold the subject matter of the action in medio. This contention seems to answer itself. No case of laches is made on the pleadings or was urged before us or in the Court below.

It was further contended that, by contracting to sell to plaintiff, Mrs. Elliott divested herself of all interest in the land in question; that thereafter she had, in respect of the land itself, only a lien upon it as security for the payment of the purchase money; that when the action was registered as a lis pendens Mrs. Elliott's interest had not the quality of real estate, and could not be affected by that registration; and it was not unreasonably said that in such circumstances the registration of the action was a challenge of plaintiff's title, of such publicity and of such effectiveness as to constitute a cloud to embarrass plaintiff in the exercise of his rights of ownership, and to justify this action.

That Mrs. Elliott retained, after the registration of this contract of sale, and so long as any part of the purchase money remained unpaid, an interest in the property, the subject of the contract, capable of being affected by lis pendens, seems to me too clear for discussion, but in deference to the very earnest argument addressed to us on behalf of plaintiff, I proceed to state my reasons for this opinion.

I shall for the present assume that, except in so far as he is (by the operation of the doctrine of lis pendens) bound by that judgment in defendants' action, the conveyance from Henry Elliott to his wife is to be taken as valid in favour of plaintiff.

Digitized by Google

And first, apart from statute. It is true that upon a contract for the sale of land the interest of the vendor is for some purposes regarded as personal property; on the death of the vendor the purchase money is for fiscal purposes so treated; is recoverable by the executor virtute officii; in case of intestacy passes to the next of kin, and not to the heir at law. In Manitoba it has been held that a vendor's lien is not an interest in land within the meaning of the statutes in force there relating to the recovery of judgment debts; the Manitoba Court, in this case, following a notable dissenting judgment of Mowat, V.-C., in Parke v. Riley, 3 E. & A. 215.

But I cannot agree that even in this restricted view of the vendor's rights his interest is free from the operation of the doctrine of lis pendens. A leasehold or mortgage of real estate passes to the executor, or in case of intestacy to the next of kin; generally for the purposes of administration both species of property are treated as personal estate; and neither is exigible under process as an interest in land. Yet leaseholds have always, for the purpose of determining priorities, been treated as land; so, for more than a century have mortgages of real estate: Taylor v. London and County Banking Co., [1901] 2 Ch. 254. Moreover, the doctrine of lis pendens has always been held to apply to leaseholds, and I cannot find that it has been doubted that it applies to such mortgages.

So while for some purposes, and in some relations, a vendor's interest in his real estate after sale, and before completion, may be treated as personal estate, this description of it can only be accepted in a much qualified sense. The legal nature of that interest where the purchase money is payable by instalments, is best described in the oft quoted speeches of Lord Westbury and Lord Cranworth in Rose v. Watson, 10 H. L. Cas. 672. To quote Lord Westbury at p. 678:—"When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract. Where the contract undoubtedly is an executory contract, in this sense, namely, that the ownership of the estate is transferred, subject to the payment of the purchase money, every portion of the purchase money paid in pursuance of that contract is a part performance and execution of the contract, and, to the



Digitized by Google

extent of the purchase money so paid, does, in equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate."

Thus, the vendor retaining the legal estate has as between himself and his purchaser a beneficial interest in the property sold "personal and substantial," as Lord Cairns puts it; proportional to the amount of the purchase money "unpaid," as Lord Westbury puts it; unquestionably an interest in land, and therefore subject to lis pendens.

Thus, apart from the Land Registry Act. That Act provides (sec. 23) that the registered owner of an absolute fee shall be deemed to be the prima facie owner of the land described or referred to for such an estate of freehold as he legally possesses therein; by sec. 24, persons claiming any equitable interests in real estate may register such an interest as a charge; by sec. 37, "Any person who shall have commenced an action in respect of any real estate may register a lis pendens against the same by means of a charge."

Here Mrs. Elliott had in September, 1897, the absolute fee, and plaintiff had a charge registered as an equitable interest under sec. 24; even assuming that the word "legally" in sec. 23 is not used in a restricted sense as opposed to equitably, I am unable to comprehend the reasoning which leads to the conclusion that the absolute fee referred to in sec. 23 is not, and that the charge referred to in sec. 23 is, real estate within the meaning of sec. 37.

The action was therefore rightly registered as a lis pendens in September, 1897, but a further question arises: Did plaintiff, by virtue of the arrangement in November, 1898, and the conveyance of the land to him, acquire the right to have the registration vacated?

In considering this question, one must bear in mind some elementary principles. The doctrine of lis pendens is merely an application of the maxim of forensic policy, interest reipublicæ sit finis litium.

A litigant party is not permitted by alienation pending the suit to defeat the rights or delay the proceedings of his adversary; for if so, the litigation by successive assignments might be rendered interminable: Bellamy v. Sabine, 1 DeG. & J. 578, 580, 584:—"Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision

Digitized by Google

of the Court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings." So Lord Cottenham, also, at p. 578.

From the statement of the rule, and the ground on which is rests, it is sufficiently obvious that it cannot be applied to persons who have acquired interests before the commencement of litigation, so as to affect such interests: see Manson v. Howison, 4 B. C. R. at p. 406, per McCreight, J.: for such persons can once for all be ascertained, and, if necessary, made parties to the action. But while this limitation is obviously involved in the very nature and object of the rule, it must be equally obvious that the rule does apply to such persons in respect of interests acquired after the commencement of litigation. In respect of the rights in the lands in question, acquired by plaintiff through the execution of his agreement with Mrs. Elliott, he was not bound by the result of her litigation with defendants; but any interest acquired by him after action, not in consummation of the agreement, he took subject to the event of the action.

Now, as we have seen, at the time of the execution of the agreement Mrs. Elliott had, according to the paper title, not only the legal estate but a substantial beneficial interest in the property proportionate to the amount of the purchase money unpaid; on payment of this balance of purchase money this beneficial interest would have passed by force of the agreement. The purchase money was not paid, and no interest passed by force of the agreement; but by a fresh alienation, the deed referred to, made pending defendants' action, the legal estate was transferred to plaintiff. Can there be any doubt that the estate so acquired remained subject to the rights of defendants as they should be determined by the result of their action? The trial Judge has treated this conveyance as a mere incident in the settlement of accounts. But call it by any name, it was a transaction affecting the title to real estate in litigation. The law does not permit such a transaction to impair the rights of the actor in that litigation.

These considerations dispose of plaintiff's claim as disclosed by the pleadings. The substantial question involved is not discoverable by a perusal of the pleadings. It arises

Digitized by Google

out of a contention of defendants that the registration of the lis pendens established a charge upon the lands in question for the amount of the purchase money unpaid at the date of the registration; and that plaintiff is entitled to relief only on the terms of paying off this charge. As to the part of the purchase money still unpaid, it is not disputed that plaintiff has always been willing to account for that to the estate of Henry Elliott; so that the whole controversy in substance relates to the question whether plaintiff should be compelled, in order to get a title, to pay again that portion of the purchase money which he has paid since the registration of the lis pendens.

As I have said, the pleadings are silent on this question, but it is not disputed that the controversy on it gave rise to and is the real subject matter of the litigation. It was, as Mr. Bloomfield with great candour admitted, the real ground of dispute at the trial; it is the principal topic of discussion in the judgment of Irving, J.; with it the appellants' argument before us was wholly concerned; in a word, the parties have accepted and presented it as the substantive issue in the action.

This issue, must, I think, be decided in favour of plaintiff. Two questions arise: first, does the evidence establish as against plaintiff that the conveyance to Mrs. Elliott was fraudulent? Second, if so, was plaintiff so affected by such notice of the fraud before making the payments in question as to involve him in the consequences of that fraud?

That the conveyance was fraudulent is established as against Mrs. Elliott by the judgment in defendants' action, and by the judgment plaintiff is bound, as I have pointed out, in respect of the interest transferred to him by the conveyance after the commencement of that action. But, as against plaintiff, nothing relevant to this issue with which we are now dealing is established by that judgment; res inter alios, it is not in this issue evidence against plaintiff: Natal Land Co. v. Good, L. R. 2 P. C. at p. 123. Now plaintiff purchased from the holder of a registered title; his bona fides and want of actual notice were found by the trial Judge as a fact, and before us that finding was not impugned; he was the owner of a registered charge before the commencement of defendants' action, and the registration of the lis pendens, and might have been made a party to that action. In these circumstances I think the onus was on defendants in this

Digitized by Google

issue to maintain their title to the payments in dispute by proving affirmatively against plaintiff the fraud of the Elliotts; and against plaintiff as a bona fide purchaser for value any slip in procedure, or any failure in strict proof, is generally fatal: Sorrel v. Carpenter, 2 P. Wms. 482; and Sugden V. & P., 9th ed., p. 283.

However, in my opinion, plaintiff does not depend upon this view of the burden of proof for success in this issue. Assuming Mrs. Elliott's title to be vitiated by the fraud of herself and her husband, plaintiff's rights under the agreement are not, I think, open to attack on that ground.

The case was dealt with on the pleadings and argued before us as if plaintiff as a purchaser of a registered title bona fide and for value was protected by the provisions of the Land Registry Act. I cannot agree with this view. I cannot find anything in that Act which protects plaintiff from attack under 13 Eliz. ch. 5. The Land Registry Act provides in sec. 43, sub-sec. 4, that "Every unregistered title, interest, or disposition, affecting registered real estate, or any registered interest in real estate, shall as against a purchaser for valuable consideration of such real estate, or interest, be utterly void and of no effect unless the person holding or claiming such unregistered title or interest, or taking or claiming under or by virtue of such unregistered disposition, shall obtain from the owner and hold in respect of such real estate or interest a certificate of registered estate."

And in sec. 43, sub.-sec. 7, that "Save as in this section aforesaid, no purchaser for valuable consideration of any registered real estate, or registered interest in real estate, shall be affected by any notice, expressed, implied, or constructive, of any unregistered title, interest, or disposition affecting such real estate other than a leasehold interest in possession for a term not exceeding three years, any rule of law or equity notwithstanding.

Neither of these provisions has, in my judgment, any application here. The creditors of Henry Elliott had a statutory right to invoke by appropriate proceedings a judicial declaration of the facts, which, by the provisions of 13 Eliz. ch. 5, made void ab initio the conveyance from Henry Elliott to his wife. This statutory right was neither an unregistered title, nor an unregistered interest, nor an unregistered disposition.

Digitized by Google

Indeed, as the protection of these enactments extends to all purchasers for valuable consideration, without regard to good faith or bad faith, it seems improbable that the authors of them conceived the likelihood that they would be set up as a shield for the kind of fraud struck at by 13 Eliz. ch. 5.

Plaintiff might, therefore, I think, rely upon the protection afforded by the saving clause, sec. 5, commonly known as sec. 6, of the last mentioned statute. That section reads as follows:—

"VI. Provided also, and be it enacted by the authority aforesaid, that this Act, or any thing therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed, or assured, or hereafter to be had, made, conveyed, or assured, which estate or interest is or shall be upon good consideration and bona fide lawfully conveyed or assured to any person or persons, or bodies politick or corporate, not having at the time of such conveyance or assurance to them made, any manner or notice or knowledge of such covin, fraud, or collusion as is aforesaid; any thing before mentioned to the contrary hereof notwithstanding."

That plaintiff's contract with Mrs. Elliott was an assurance within this section is, I think, established by Halifax Joint Stock Banking Co. v. Gledhill, [1891] 1 Ch. 31, which decides that an equitable, as well as a legal, interest is within its protection.

It is settled law that the protection afforded a bona fide purchaser for value is available in favour of a purchaser who, having bought without notice, becomes aware of an adverse title before the whole of the purchase money has been paid, only to the extent of payments made prior to such notice: Rayne v. Baker, 1 Giff. 241; Bigelow on Fraud, pp. 474 and 475.

Plaintiff here had in fact no notice of the adverse claim of the creditors of Henry Elliott. His liability to account for the sum claimed by defendants, therefore, depends upon the answer to this question: Is notice of this adverse claim to be imputed to him by reason of the registration of the lis pendens?

By sec. 37 of the Land Registry Act, it is provided that any person who has commenced an action in respect of any

Digitized by Google

real estate may register a lis pendens against the same by means of a charge. By sec. 40 it is provided that "The registration of a charge shall give notice to every person dealing with the real estate against which such charge has been registered of the estate or interest in respect of which such charge has been registered, but not of the contents of such instrument." I do not regard the payment by the plaintiff of purchase money pursuant to his contract as a dealing with land within the meaning of this section.

Otherwise, consider the purchaser's position. The vendor might have charged his interest (as in Rayne v. Baker, supra), and if the charge should be registered, the purchaser, having imputed notice by reason of this last registration, would be liable to account to the chargee for all payments thereafter made to the vendor. No such payments could be safely made except at the Land Registry office after search for intervening registrations. A mortgagor paying off his mortgage would find himself in a like position. Unless the language be intractable, a construction leading to such consequences should not be adopted; and, while I see no difficulty in placing a workable construction on sec. 40, when read alone, its meaning becomes more apparent when read with sec. 41, the words of which are as follows:—"41. When two or more charges appear entered on the register, affecting the same land, the charges shall, as between themselves, have priority according to the dates at which the applications respectively were made, and not according to the dates of the creation of the estates or interests."

The rights acquired under a charge cannot therefore he impaired by the subsequent registration of another charge affecting the same lands. I think full effect is given to both sections by holding that sec. 40 does not affect with notice the owner of a prior charge in respect of any rights secured to him by the instrument creating that charge. This view is consistent with the decisions upon the parallel provisions of the Ontario Registry Act: Pierce v. Canada Permanent Co., 25 O. R. 679; Gilleland v. Wadsworth, 1 A. R. 91.

There remains the question whether there is any form of relief to which plaintiff is entitled. Plaintiff has offered to pay the unpaid purchase money as the Court shall direct; and it is regrettable that we cannot at once direct that on payment of that sum the registration of the lis pendens

Digitized by Google

shall be vacated; but, as at the commencement of the action he was not entitled to judgment vacating the lis pendens, he cannot now, I think, agreeably to established rules, have any relief of that character, conditional or otherwise. The rule that a cause of action, imperfect at the issue of the writ, is not perfected by subsequent events, seems to be as inflexible in equity as at law: Evans v. Bagshaw, L. R. 5 Ch. 340; Pilkington v. Wignall, 2 Madd. 244; Story's Equity Pleadings, par. 342; and see the authorities collected in the reporter's note in 33 Beav. at p. 285. If he be entitled to any remedy, therefore, it must be by way of declaration of right alone and not by way of consequential relief.

As Martin, J., has pointed out in a recent judgment (William v. Jackson, 11 B. C. R. 133), the jurisdiction conferred by Order XXV., r. 5, should be exercised sparingly; and, in the absence of special circumstances, not at all where the law provides a summary procedure by which plaintiff's rights could have been ascertained.

On the argument I was disposed to think that plaintiff had such a summary remedy under secs. 85 and 88 of the Land Registry Act. But a careful examination of these sections convinces me that in practice the procedure there provided is not available where the nature and extent of the interest affected by the lis pendens is not ascertained; and more especially where, as in this case, the controversy between the parties relates almost entirely to the nature and extent of that interest.

The enactment provides no means by which such a controversy can be determined, and, so long as it remains in dispute, it is difficult to understand from what source the Judge hearing the application is to be furnished with a basis for the judicial ascertainment of the amount of security to be required.

I have come to the conclusion that in this case the power conferred by Order XXV., r. 5, may be beneficially exercised. The real controversy between the parties has been litigated; plaintiff, as a bona fide purchaser for value, is entitled to the benefit of the most liberal view of all rules of procedure; and we ought, I think, formally to determine the issue, which we have decided in substance, by declaring that plaintiff was within his rights in making the payments of purchase money to Mrs. Elliott before notice of the adverse claim of

Digitized by Google

defendants; that the lis pendens does not affect the interest acquired by plaintiff under his contract; and that defendants have a charge on the lands for the amount of purchase money unpaid. Such a declaration would, I think, in the language of Jelf, J., in Attorney-General v. Scott, 20 Times L. R. 633, be both "definite and useful."

The action, in form at all events, relates to the title to land; and the legislature has, therefore, left us a discretion as to the disposition of costs. These costs have been liberally swelled by the misconceptions of both parties; and, as I cannot strike a balance between them, each party should, I think, bear his own, both here and below.

The judgment of Irving, J., will be varied in accordance with this opinion.

---

## BRITISH COLUMBIA.

### (VANCOUVER.)

APRIL 15TH, 1905.

FULL COURT.

## CENTRE STAR MINING CO. v. ROSSLAND-KOOTENAY MINING CO.

*Mines and Minerals — Trespass Workings — Abstraction of Ore — Injury by Predecessors in Title — Agreement with New Company—Partnership between Old and New Company—Construction of Agreement—Conversion of Ore—Notice to New Company—Accumulation of Water—Nuisance—Injunction—Nominal Damages.*

Action for trespassing upon and abstracting ore from the Centre Star mineral claim by means of trespass workings extending from defendants' adjoining claims, the Nickel Plate and the Ore-or-no-go, and also for injury caused by an alleged accumulation of large quantities of water in the trespass workings.

The trespass had been committed by defendants' predecessors in title, the Rossland Great Western Mines, Limited.



Digitized by Google

On 2nd May, 1902, the Rossland Great Western Mines, Limited, and one W. B. Mitchell entered into an agreement providing that the company should sell all their assets and undertaking to a new company to be formed for that purpose under the name of the "Rossland-Kootenay Mining Company, Limited," on certain terms and conditions, which included one that the new company should pay and satisfy the debts and liabilities of the old company of whatsoever nature, and should indemnify the old company therefrom. It was also agreed that the new company should "take over and perform all the uncompleted contracts and engagements of the old company and indemnify them from all liability thereon." The books and documents of the old company were to be handed over to the new company, except those relating to their constitution.

Subsequently, on 28th May, 1902, an agreement was entered into by the old company and Mitchell and defendants whereby the agreement of 2nd May was adopted in all respects as if defendants had been a party thereto instead of Mitchell.

On 2nd August, 1902, a license (to an extra-provincial company), under sec. 124 of the Companies Act, was issued to defendants, and in it clause 1 of the objects for which the company was established was:

"To adopt, enter into, and carry into effect, with or without modifications, two agreements, one dated the 2nd day of May, 1902, and made between the Rossland Great Western Mines Limited (a company registered under the Companies Acts, 1862 to 1898, hereinafter called the "Rossland Company"), of the one part, and William Blayney Mitchell, as trustee for this company, of the other part, for the acquisition of the assets and undertaking (subject to the liabilities) of the Rossland Company; the other dated the 2nd day of May, 1902, and made between the Kootenay Mining Company Limited (a company registered under the Companies Acts, 1862 to 1898, hereinafter called the "Kootenay Company"), of the one part, and William Blayney Mitchell, as trustee for this company, of the other part, for the acquisition of the assets and undertaking (subject to the liabilities) of the Kootenay Company, and to develop, work, turn to account, or deal with the property comprised in the said two agreements, and to exercise any of the hereinafter mentioned powers and objects of this company, which powers and ob-

Digitized by Google

jects may be exercised independently of the primary objects stated in this clause, and this clause shall not minimize or derogate in any way from the company's powers of acquiring other mines, either in addition to or in substitution for the property referred to in the said two agreements," etc.

The action was tried before MARTIN, J., at Rossland in December, 1904.

MARTIN, J.:—It is alleged in the statement of claim, first, that defendant company, the owners of the Nickel plate and Ore-or-No-Go mineral claims, trespassed upon the Centre Star Mineral claim, the property of plaintiff company, and took certain ore therefrom, or, alternatively, that if defendant company did not do so, their predecessors in title (the Rossland Great Western Mines Ltd.) did. The evidence shews that it was the latter company and not defendants that took the ore, but it is sought to make defendants liable for the trespass, on the ground that the effect of the agreement made between the latter company and Mitchell, dated 2nd May, 1902, before defendants were in existence, and the confirmatory agreement between them and Mitchell of the one part, and defendants of the other part, dated 28th May, 1902, is to create a partnership between these two companies under the name of defendants; and the license issued to defendants on 2nd August, 1902, is relied upon in support of this view. On this point it is sufficient to say that, after considering the additional authorities cited by leave, I see no reason to alter my opinion formed at the trial, which is, that the license, being permissive in its nature, cannot be regarded in the same light as an Act of Parliament expressly creating a statutory obligation, and that there is no privity of contract between the plaintiff and defendant companies, nor can they be regarded as partners in the proper sense of that term. It is to be observed that clause 1 of the agreement of 28th May says in effect that the prior agreement of 2nd May is to be read as though defendant company had been a party thereto instead of Mitchell. Now, even if that agreement had originally been so entered into between these two companies, it is apparent, to me at least, that the present plaintiffs would have no cause of action against defendants for torts committed by the Rossland Great Western Mines Limited. The case of Natal Land Co. v. Pauline Colliery Syn-

Digitized by Google

dicate, [1904] A. C. 120, supports in general the foregoing views.

Secondly, it is alleged that in any event defendants are liable for conversion of the ore, estimated at 2,011 tons, now lying on their property on the Nickel Plate dump, which was admittedly wrongfully taken by their predecessors from the Centre Star claim.

For the present consideration of the point, I shall momentarily accede to the contention of plaintiffs' counsel that when defendants on 16th August, 1902, took possession of the Nickel Plate and Ore-or-no-go claims they became affected with notice of the fact that this ore had secretly come from the Centre Star mine, and was the property of plaintiffs, and that they did not convey that information to plaintiffs till the middle of March, 1903, which was the first knowledge plaintiffs had thereof: since that time plaintiffs have been at liberty to remove the ore from dump without any interference by the defendants, but they have not seen fit to do so. It cannot, properly speaking, be said that defendants wrongfully, if at all, took possession of the property, because it had been where it was long before defendants began to exist in British Columbia on 2nd August (the date they received their license), nor, as Thompson says, did they begin to do business till the 16th of that month, when they took possession of the claims and plant aforesaid. They did not in any way attempt to deal or interfere with the ore or exercise over it any rights whatever, but simply left it lying where it was. It is, I think, fair to say, in the circumstances, that defendants may be considered to be in a state of innocence as regards this ore till the last mentioned date at least.

Despite these facts, plaintiffs contend that defendants should be held accountable therefor to the same extent as the original trespasser, but cite no authority in support of such an extreme view. I quite agree that one who trespasses upon another's mining ground and clandestinely abstracts ore therefrom should be held strictly accountable for his fraudulent acts, and every thing in doubt should be presumed against him as the result of his dishonest conduct, but I fail to see that defendants can in any way be regarded as occupying that position. The situation is similar to a case where a man buys a field from A., knowing that A. has left on it some sacks of potatoes which are the property of

Digitized by Google

B., though unknown to B., and simply says and does nothing but lets them lie there till they rot away. In such circumstances is the purchaser liable to B., and if so, for what, and on what principle? In my opinion, he is clearly not liable at all, though it would have been a neighbourly and friendly act to have notified B. And the principle does not differ because the chattels happen to be imperishable, like ore, instead of perishable, like potatoes. To my mind, there is no element of conversion in such a state of affairs, because to constitute this injury there must be some act of the defendant repudiating the owner's right, or some exercise of dominion inconsistent with it, while here there was nothing of the kind, nor was even formal possession ever attempted to be taken. Mere passivity is all that defendants can be accused of, but there must be more than that before conversion can be established. As was said by Mr. Baron Parke in Simmons v. Lilystone, 8 Ex. 431, "In order to constitute a conversion there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it."

And see also Lethbridge v. Phillips, 2 Stark. 544; Thorogood v. Robinson, 6 Q. B. 769; Fouldes v. Willoughby, 8 M. & W. 540; and Hollins v. Fowler, 7 H. L. 757; wherein it is also shewn that even where there is possession, if of lawful origin, there must be a demand and refusal before an action for conversion will lie, and there has been no demand here. The result of the cases is concisely summed up in Addison on Torts, 7th ed., p. 504, as follows:—"A man cannot be made a bailee of goods against his will; and, therefore, if things are left at his house, or upon his land, without any consent or agreement on his part to take charge of them, he is not thereby made a bailee of them; and if the goods are demanded of him, and he says he will have nothing whatever to do with the goods, such a declaration, in answer to a demand of the goods, is no evidence of a conversion of them."

In arriving at the foregoing conclusion I have assumed that the property alleged to have been converted is of commercial or market value, for if it is not, defendants' case is not only greatly strengthened as to the conversion itself, but there would be no damages in such circumstances as exist here.

Digitized by Google

Now the proper measure of damages, if any, is the amount of pecuniary loss plaintiff has sustained by the conversion of the chattel, i.e., what it was worth at the time of the conversion, and if he does not receive it back he is entitled to its full market value. The question then arises what is the fair market value of the ore in question? According to Thompson it was simply waste material on the dump, and taken on the average would not run more than $3 to the ton, total value. James Cram, a witness for plaintiffs, places it at $3.60 to $4.60. but, though the onus is on plaintiffs to establish the market value, no evidence at all is adduced to shew that ore of so low a grade has any market value whatever: it certainly is not shipping ore. Simply because there is a certain amount of precious metal in ore, that does not mean that it has any market value, because, for example, ore which carries $5 worth of gold per ton but requires an expenditure of $6 to extract it, is worth just $1 less than nothing, and is not only useless to its owners but an incumbrance about their mine.

On the evidence, which is all I am entitled to consider, I am forced to the conclusion that since the time plaintiffs became aware that the ore was lying as waste on the Nickel Plate dump, they knew it was valueless to them or any one else in that position, and therefore have suffered no damage by any act of defendants in regard thereto.

In the third place, it is alleged that defendants unlawfully permitted and permit a large body of water to accumulate in their mine whereby is caused an undue flow of water into plaintiffs' mine.

This raises a difficult question of fact, which must be determined before the cases cited can properly be considered. The difficulty in arriving at a satisfactory conclusion is, however, lessened by the view already expressed, that defendants cannot be held responsible for the trespass workings as such, nor have they ever made any use of them. The onus of proving that the maintenance of a column of water in defendants' shaft caused an increased flow into plaintiffs' mine is upon plaintiffs, but, though this should be clearly established, I feel bound to say that, generally speaking, the evidence in support of the allegation is not of that precise and definite nature which would be expected, and while it is often plausible and theoretical it is likewise often far from convincing. The evidence of Davis and Jenkins does establish the fact

Digitized by Google

that there was within the dates mentioned an increased flow of water into the Centre Star mine, but they must go further than that and show that this increased flow came from defendants' workings.

In the face of much that is vague and theoretical regarding real and supposed natural seams and channels, there is this clearly established and striking fact that when the water had ceased flowing into the Centre Star mine on 24th June it was perhaps 10, but not more than 20, feet below the Nickel Plate 200 foot level, and some 180 feet above the highest point of the trespass workings from which it is alleged the water escaped into the Centre Star mine, chiefly at its 400-foot level, which is on a slightly higher plane than the Nickel Plate corresponding level. On this peculiar fact defendants' counsel not unnaturally enlarges and contends that unless water can be proved to flow up-hill his client is clearly not responsible for its presence in the Centre Star, and that it must have got into that mine through theretofore unsuspected natural seams and fissures from undiscovered sources. This is undoubtedly the salient fact in the case, and it must be grappled with and satisfactorily explained, for, in the face of it, it is not sufficient to rely on the mere coincidence, singular though it is, that the Centre Star, theretofore a dry mine, did not become wet till after the Nickel Plate shaft was allowed to fill up. Plaintiffs' counsel on the argument at the trial was unable to solve the problem, nor have I been able to do so after a further close consideration of the evidence. Such being the case, I can only find that the basic fact on which this branch of the action must stand or fall has not been established.

In case it may be thought material, should the matter go further, and as a matter of precaution, I find that the bulkheads were in every way well and properly constructed to perform the function expected of them. And in regard to the water in the trespass workings, I think it proper to say that I place most reliance on the evidence of Thompson, who has a better knowledge and experience thereof than any other witness. The action must be dismissed with costs.

Plaintiffs appealed. The appeal was heard by HUNTER, C.J., DUFF and MORRISON, JJ.

A. C. Galt, for appellants.

E. P. Davis, K.C., and C. R. Hamilton, for respondents.

Digitized by Google

The judgment of the Court was delivered by

HUNTER, C.J.:—The facts appear in the judgment of the learned trial Judge.

So far as concerns the questions which were the subject of the main argument for appellants, I agree with the decision of the trial Judge. I see no ground on which defendants can be made liable for the tort of their predecessors. The transfer between them stipulates, it is true, that the former's liabilities are to be assumed by the latter, but the idea that C., being a stranger to a contract between A. and B., which provides that B. should settle A.'s liability to C., has a right of action against B., unless the transaction was such as to make B. his trustee, was finally exploded in Re Empress Engineering Co., 16 Ch. D. 125. The case of Ecclesiastical Commissioners v. North Eastern R. W. Co., 4 Ch. D. 845, referred to by Mr. Galt, was that of a company being amalgamated by statute with another company, the first company being dissolved and their property and contracts transferred to, and their debts, liabilities, and obligations being imposed upon, the other company, and it was held that there was thus a statutory liability available to the party injured by the first company's trespasses.

With regard to the question of the conversion of the ore, it was not proved that there was any conversion by defendants, but, on the contrary, it was always at plaintiffs' disposal so far as they were concerned.

As to the injury and expense caused by the invasion of water, if it could be clearly shewn that the water came in through the trespass workings from defendants' workings, there can be no doubt that defendants would be liable, on the ground that they were maintaining a nuisance which was created by their predecessors in title. It was, however, candidly enough admitted by Mr. Kirby that it was impossible to state the source of the water, that is to say, it might have seeped into the trespass workings and thence into plaintiffs' mine from the Nickel Plate, in which case defendants would be liable, or it may have come in from plaintiffs' own property on the Ore-or-no-go, in which case defendants would not be liable, whether it came in through the trespass workings or not, or it may have come in from the Nickel Plate by natural drainage, and not through the trespass workings, in which case also defendants would not be liable. It being impos-

Digitized by Google

sible to trace how much, if any, of the water came in from the Nickel Plate through the trespass workings, defendants cannot be made liable on this branch of the case.

There is, however, a ground on which, in my opinion, defendants are liable, which is that they have maintained a nuisance by allowing water to get into the trespass workings from the Nickel Plate. It was not sufficient for them to have bulkheaded the workings at the Centre Star boundary —in fact that they would have no business in these workings at all without plaintiffs' consent, as the latter are the owners in fee of the Ore-or-no-go, subject to the right to mine vested in defendants; but they should have bulkheaded the workings at their own boundary. There can be no doubt that to allow water to get into these workings from the Nickel Plate, from which they became no doubt in large part filled up, was to render the nuisance a highly dangerous one, as great damage must necessarily have ensued to plaintiffs, and probably loss of life if they in the exercise of their right to mine their own ground had broken into the workings in ignorance of their existence. As it is, knowing of their existence, they are, of course, precluded from mining the ore in their vicinity without going to the expense that will be necessary to prevent any damage or danger.

I think that plaintiffs were and are entitled to have the trespass workings kept protected against water coming in from the Nickel Plate, and that there ought to be an injunction restraining defendants from permitting these workings to remain open at the Nickel Plate boundary and from permitting any water to flow from the Nickel Plate through these workings into plaintiffs' mine.

As to the damage arising from the legal injury to plaintiffs' rights, and so constituting a menace for the time being to the lawful use and enjoyment of plaintiffs' property, caused by Nickel Plate water being allowed to get into these workings, it has not been shewn that defendants have sustained any actual damage, and, therefore, there can be judgment for nominal damages only, which I am content to place at $10. Had defendants failed to inform plaintiffs of the existence of these workings before they allowed them to fill up with water from their mine, the question might have arisen as to whether the Court should not award exemplary damages, inasmuch as defendants' general manager was the

Digitized by Google

general manager of their predecessors in title, by whose direction the tortious excavations were made, and of course his knowledge was their knowledge, but, as it is, that question does not arise now.

Plaintiffs are entitled to the costs of the action, less the costs of those issues on which they failed, together with the costs of this appeal.

---

## YUKON TERRITORY.

### FULL COURT.

APRIL 10TH, 1905.

### ANGLO-KLONDIKE MINING CO. v. COOK.

*Mines and Minerals — Water Regulations — Jurisdiction of Gold Commissioner—Res Judicata — Estoppel — Water Rights—Priorities.*

Appeal by defendants from a decision of the Gold Commissioner.

The appeal was heard by DUGAS, CRAIG, and MACAULAY, JJ.

J. G. Hay, for appellants.

F. J. McDougal, for plaintiffs.

MACAULAY, J.:—This is an appeal from the judgment of the Gold Commissioner dated 18th June, 1904, whereby, on an application by defendants of 6th January, 1904, for the right to extend for 7 years a grant issued to them for 200 inches of water upon Boulder creek of 15th July, 1901, for 5 years, and upon the protest of plaintiffs, the Gold Commissioner granted the application, but subject to a prior right to plaintiffs to use 50 inches of water from the said creek or pup after 15th July, 1906.

From this judgment defendants appeal, contending that their grant should not be subject to the said 50 inches of water to plaintiffs as aforesaid.

Digitized by Google

On the appeal before us the question arose as to the jurisdiction of the Gold Commissioner to decide a protest of this nature except by way of appeal from the decision of the Mining Recorder; the water regulations in this territory providing that all disputes over water grants should be settled before the Mining Recorder; and this matter not having been decided by the Mining Recorder in the first instance, the Gold Commissioner had no jurisdiction to make the decision appealed against.

On examining the orders in council I find, however, that the order in council of 7th July, 1898, sec. 5, clause 8, amongst other things, provides that the Gold Commissioner shall be the Mining Recorder at the headquarters of the Government of the Territory. The headquarters of the Government of the Yukon Territory are at Dawson, and, under that order in council, the Gold Commissioner undoubtedly, in my opinion, had the authority to adjudicate upon the protest in this case.

The respondents on this appeal contend that this matter is res judicata, and, in paragraph 4 of their protest, plead that, by decision of the Gold Commissioner dated 9th October, 1903, this same matter was disposed of on an application between the same parties for the same amount of water from the same creek or pup, and that, consequently, defendants are estopped from asserting their right to such water, they not having appealed from that judgment.

I was, at first, inclined to think that defendants were estopped by that plea, but on closer examination I find that, although the action was between the same parties for the same amount of water from the same creek or pup, the position of the parties has been altered since 9th October, 1903, because plaintiffs have applied for and have had an extension of grants given to them for water from Boulder creek and its tributaries nearer the source of Boulder creek than 20 pup, which alters their position and that of defendants, because defendants could not now apply for, and obtain, water rights from those creeks, which would have been open but for such renewal grant as aforesaid. I am of the opinion, therefore, that they are not estopped by that judgment from bringing this appeal.

Mr. George T. Coffee, the manager of the plaintiff company, gave evidence on behalf of his company, and, in answer to a question as to whether or not he could work his

Digitized by Google

claims without this water from 20 pup, makes the answer "Not so well." He is the only witness called on behalf of plaintiffs.

The defendants put several witnesses in the box who state that plaintiffs, having received a renewal of their water grants until the year 1920, if they were given the first right to use 50 inches of water from 20 pup after defendants' grant expires on 15th June, 1906, defendants would be absolutely debarred from continuing their mining operations in the future.

The Gold Commissioner was of the opinion that because plaintiffs had used this water from 20 pup (although they had made no application for the right to use it) before defendants had applied for the water grant to use water from this pup, they were entitled to an equitable right in the water as against defendants. I am unable to view the matter in the same light as the Gold Commissioner, and if, as the evidence discloses, defendants would be debarred from mining entirely if plaintiffs were given this prior 50 inches from 20 pup, then I think it would be inequitable to make such a grant. The object to be attained, as I understand it, is to encourage all miners to carry on their operations, and that water grants should be given in such a manner that all miners having claims to work should obtain a fair share of the water in the creeks adjoining their property for use in their mining operations.

In this case, on the evidence, it seems to me the equities are in favour of defendants, and, for the reasons above stated, I am of the opinion that this appeal should be allowed with costs and that plaintiffs' right to 50 inches of water from 20 pup should be subject to defendants' prior right to their 200 inches granted to them during the continuance of defendants' water grant, and that the judgment of the Gold Commissioner should be varied accordingly.

DUGAS, J., gave reasons in writing for holding that the appeal should be allowed and the judgment of the Gold Commissioner set aside.

CRAIG, J., gave reasons in writing for holding that the judgment of the Gold Commissioner should be reversed and the application of defendants granted in with costs.

Digitized by Google

THE

# Western Law Reporter

VOL. I. TORONTO, JUNE 1, 1905. No. 8.

## YUKON TERRITORY.

APRIL 10TH, 1905.

FULL COURT.

### GRAVES v. McDONALD.

*Mines and Minerals—Water Grants—Renewal—Ditch—Compensation—Interference.*

Appeal by defendants from a decision of the Gold Commissioner.

The appeal was heard by DUGAS, CRAIG, and MACAULAY, JJ.

J. P. Smith, for appellants.

F. L. Gwillim, for plaintiff.

MACAULAY, J.:—This is an appeal from the judgment of the Gold Commissioner delivered on 3rd June, 1904.

The defendants in this case applied for a renewal of certain water grants from the right fork of Last Chance creek and pups at 15 and 22 above discovery, which expired in the months of June, July, and August of the year 1904.

Plaintiff entered a protest against such renewal grants to defendants, and applied for a certain number of inches



Digitized by Google

to be granted to him through a ditch to be staked out by him in the manner provided in the application. Defendants did not object to such grant being given to plaintiff, but contended that he should build his own ditch for carrying such water and not interfere with the ditch that had been built by defendants at an enormous expense.

The Gold Commissioner in his judgment grants to plaintiff and defendants the water applied for, plaintiff to receive one-third of the water and defendants two-thirds, the water to be allowed to run through defendants' ditch, plaintiff to bear one-third of the expense of keeping the ditches and flumes in repair, and defendants two-thirds of the expense. I am not prepared to say that he has not used the proper discretion in allowing the water granted to plaintiff to run through the defendants' ditch, and it may possibly be better for all parties that such a course should be adopted. Plaintiff will certainly be saved the expense of building a ditch for himself. Defendants, however, having built this ditch at their own expense, it seems to me should be compensated by plaintiff if he is to have equal ownership in it with them.

I am of the opinion that plaintiff should pay a proportionate share of the cost of the ditch; that for the purpose of ascertaining what a fair proportionate amount of the cost would be that this case should be referred back to the Gold Commissioner to take the necessary evidence and assess plaintiff with a proportionate amount of the cost of the ditch; which money should be refunded to defendants, to be divided amongst them in the proportions to which they are entitled as between themselves, according to the amount of the cost of the ditch borne by them respectively, and, in my opinion, there should be no costs of this appeal to either party.

DUGAS, J., gave reasons in writing for holding that the appeal should be allowed with costs and the parties left to be dealt with by the Mining Recorder.

CRAIG, J., gave reasons in writing for holding that the case should be referred back to the Gold Commissioner to take fresh evidence.

Digitized by Google

## MANITOBA.

PERDUE, J. MAY 15TH, 1905.

CHAMBERS.

# RE CASWELL AND RURAL MUNICIPALITY OF SOUTH NORFOLK.

*Municipal Corporations—Local Option By-law—Motion to Quash—Procedure Prescribed by Statute—Non-compliance —Substantial Compliance—Petition for By-law—Percentage of Qualified Electors—Inquiry by Council—Minutes of Council—Voters' List—Certificate of Clerk—Summing up of Votes — Adjournment — Time for By-law to Take Effect.*

Application to quash by-law No. 367 of the above municipality, being a local option by-law, and also to quash by-law No. 368 of the same municipality, being a by-law providing for the taking of the vote of the electors on the local option by-law.

G. A. Stewart Potts, for applicants.

A. J. Andrews, for municipality.

PERDUE, J.:—Some 28 objections were set out in the notice of motion, but on the argument the following only were urged.

1. That no petition signed by 25 per cent. in number of the resident electors whose names appear on the last revised municipal voters' list of the municipality asking the council so to do, was received by the council before the by-law was submitted.

2. That there was no proof that the petition, if any, was signed by 25 per cent. of the electors, also that the alleged petition consisted of a number of distinct and separate documents not fastened together.

3. That there was no record that the alleged petition was ever presented to or received by the council.

4. That the clerk of the municipality did not prepare and make a list of those entitled to vote on by-law 367 and post it up in pursuance of sec. 67 of the Liquor License Act,

Digitized by Google

R. S. M. 1902 ch. 101, and that the list used in taking the vote was not a list in accordance with the Act.

5. That the certificate of the clerk as to the result of the vote was bad, as it referred to a by-law 348 and not to by-law 367.

6. That the clerk did not sum up the number of votes for and against the by-law on the day appointed for that purpose by by-law 367, but did so on a subsequent day.

7. That the by-law received its 3rd reading on 27th December, 1904, and, although passed in the afternoon of that day, it was declared to be in force on 27th December, 1904, that is to say (as alleged), from the beginning of the day.

As local option by-laws restrict the rights of individuals, the procedure in regard to the passing of them should be closely observed. In Hall v. Municipality of South Norfolk, 8 Man. L. R. 430, Killam, J., was of opinion that the safe course was to hold the by-law invalid if the method of procedure prescribed by the legislature has not been followed. A number of Ontario cases decided under the provisions of the Temperance Act of 1864, and referred to in his judgment in the above case, shew that non-compliance with a material requirement of the statute will vitiate the by-law.

Mr. Biggar in his work on Municipal Corporations, at pp. 45 and 46, lays down the principle to be deduced from the cases as follows:—

"If, in order to carry out the essential purpose of the legislature, strict compliance with the requirements of the statute appears to be a necessary condition precedent to the exercise of the power, non-observance thereof will be fatal." A large number of cases are there referred to as bearing out this view.

Where, however, there has been a virtual compliance with the statute, and the departures complained of have been rather from the letter than from the spirit of the enactment, the Court has discretion in determining whether there has been a sufficient compliance, and whether effect should be given to the objections on an application to quash.

The following cases may be referred to, as bearing out this view as to the discretionary power of the Court: Lawson v. Corporation of Reach, 19 U. C. R. 591; White v. East

Digitized by Google

Sandwich, 1 O. R. 530; Gallerno v. Rochester, 46 U. C. R. 279; Boulton v. Peterborough, 16 U. C. R. 380; Milloy v. Onondaga, 6 O. R. 573; Young v. Binbrook, 31 O. R. 108.

On an application, therefore, to quash a by-law, the consideration of the questions to be determined should be undertaken in the spirit and with the object of ascertaining whether there has been a substantial compliance with all the requirements of the statute, and not of finding some slight or trivial departure on which to hinge a decision adverse to the validity of the by-law. As Cameron, J., observed in White v. East Sandwich, "the Court is not to be astute in finding grounds on which the by-law might be held defective."

The first two objections to the present by-law may be dealt with together. It appears that some 13 papers, all with the same printed heading, each paper having a number of signatures attached, were tied up in a roll, the sheets not being fastened together, and were presented to the council as the petition for the submitting of the by-law. It is admitted that the printed headings contained matter sufficient for the petition. It is objected that these documents do not constitute a petition.

I do not think the objection should be sustained. The documents were presented together, and together expressed to the council the wishes of those who had attached their signatures. The question as to whether there were the names of 25 per cent. in number of the resident electors appended to the petition is one for the council to deal with, and we must assume that the council performed its duties and satisfied itself that this condition was complied with.

It is not contended that the requisite number of qualified electors did not sign, but that it does not appear on the minutes of the council that there was an inquiry to ascertain the fact. This, I think, must be assumed to have taken place.

The 3rd objection also fails. It is not essential that the receipt of the petition should be entered in the minutes. By-law No. 368, one of those attacked, recites that a petition had been received by the council from over 25 per cent. of the resident electors whose names were on the voters' list, requesting the submission of the by-law. Such a recital is as good evidence of the fact as an entry in the minutes.

Digitized by Google

The 4th objection was very strongly urged and presents considerable difficulty.

Section 67 of the Liquor License Act, R. S. M. 1902 ch. 101, provides that the clerk of the municipality "shall prepare and make a list of those entitled to vote on such proposed by-law, and shall, at least 10 days before the day of polling, post up true copies of the same in his office and in the nearest post office, and he shall supply a true copy of such list to each deputy returning officer." The lists posted up and supplied to the returning officers in this case were simply copies of the list of electors in the municipality for the year 1904, with a certificate signed by the clerk and in the following words:—"I hereby certify the within list to be a true copy of the last revised voters' list of the Rural Municipality of South Norfolk. (Signed) R. J. Mills, Clerk." There was nothing to shew that the list was a list of persons entitled to vote on the proposed by-law. It is true that by sec. 63 the vote is to be taken of those whose names appear on the last revised voters' list of the municipality, but it is urged that the object of sec. 67 is to provide information as to what persons are entitled to vote on the by-law. If the residents of the municipality are fixed with knowledge of the contents of the Liquor License Act, then the furnishing of a list in the form used in this case would be sufficient, as reference to it, as being the last revised list, would give the information necessary. It may well be argued that sec. 67 contemplates the furnishing of a list with a heading shewing its purpose or in some way bearing on its face the information that the names of the persons entitled to vote on the by-law were those contained in the list.

I think, however, that I must hold that the parties desiring to vote should know or should inform themselves as to who are legally entitled to vote under the provisions of the Act, and, when they had so done, the lists posted up or supplied to the deputy returning officers would shew whether they were included amongst those so entitled or not.

The certificate of the clerk as to the state of the vote shewed that 348 voted for the by-law and 171 against it. The clerk stated in the certificate that "348 persons voted for the by-law 348, and 171 persons voted against said by-law." The heading of the certificate shews that the vote was taken on a local option by-law on 20th December, 1904.

Digitized by Google

I think the certificate is sufficient and that the insertion of the figures "348" was merely a repetition of the number of voters voting for the by-law.

The 6th objection relates to the summing up of the vote. A day was appointed by by-law 368 for such summing up by the clerk, which was to take place on 21st December, 1904, at 3 o'clock in the afternoon. The clerk attended at the time and place appointed, but one of the ballot boxes had not then been returned, and only one of the persons nominated to attend was present. The clerk then postponed the summing up until he should receive the missing ballot box. Accordingly on 24th December, he notified the persons nominated to attend the summing up; they did so attend, and in their presence he summed up the votes and declared the result. The provision as to summing up the votes and certifying the result is contained in sec. 403 of the Municipal Act, R. S. M. 1902 ch. 116, the proceedings for taking the vote on a local option by-law being conducted in the same manner as the voting on a by-law required by the Municipal Act to be voted on. The section makes no provision for the clerk postponing the summing up, in case a ballot box has not been returned or any other such event has occurred.

I cannot believe that the whole matter is to fall by reason of such an accident. A literal construction should be placed on the section enabling the clerk to deal with such a contingency, ut res magis valeat quam pereat.

The clerk must have some power to adjourn in such a case or to declare the meeting as continuing until the missing ballot box should arrive. "Adjournment is no more than the continuance of the session from one day to another, as the word itself implies," Bl. Com. vol. 1, p. 186; Stephen's Bl. vol. 2, p. 392; see also Lansford Borough, 141 Penn. St. 134. I think we may regard the meeting of the clerk and the persons appointed to attend the summing up as continuing until the result was declared on 24th December.

As to the 7th objection, I think the by-law only spoke and purported to speak from the moment when it was enacted. The declaration in the by-law as to when it came into effect was equivalent to saying that it came into force immediately upon the passing of it.

In my opinion the motion to quash the by-law should be refused with costs.

Digitized by Google

## MANITOBA.

PERDUE, J. MAY 22ND, 1905.

CHAMBERS.

### McCAUL v. CHRISTIE.

*Judgment by Default—Setting aside—Defence on Merits—Discretion of Referee—Appeal.*

Appeal by plaintiffs from order of Referee setting aside a default judgment and allowing defendant in to defend.

T. R. Ferguson, for plaintiffs.

E. L. Howell, for defendant.

PERDUE, J.:—The judgment in this case appears to have been entered regularly in default of a defence. The judgment was, however, allowed to be entered by the error of a clerk in the office of defendant's solicitors in not carrying out his instructions.

As I stated at the close of the argument, I would, in such circumstances, open up the judgment and give leave to defend, if a shadow of a defence were shewn.

Under Rule 664 the matter is one for the exercise of discretion, and the Referee has exercised his discretion in defendant's favour by setting aside the judgment and allowing him to file a defence. It is urged, however, that this order should be reversed on the ground that the applicant failed to shew a defence upon the merits. Where a final judgment has been regularly entered and defendant applies to be let in to defend, there is an almost invariable rule that he must shew a good defence before the application will be granted. In such a case "the first question is whether the Court is satisfied that there is a good defence on the merits; if not, leave to come in ought to be refused:" per Jessel, M.R., in Watt v. Barnett, 3 Q. B. D. 363; see also Farden v. Richter, 23 Q. B. D. 124; Smith v. Dobbin, 37 L. T. 777; Richardson v. Howell, 8 Times L. R. 445.

I have grave doubts whether the defence sought to be set up in this case is a good defence in point of law, the alleged agreement not being in writing, and there having been no part payment of the debt made in pursuance of it.

Digitized by Google

Even if good in law, the consent by defendant to a taxation of the bill of costs in question goes far towards displacing his contention. In addition, he appears to have written letters asking for time in which to pay, and clearly shewing his intention of paying.

The matter is, however, one for the exercise of discretion, and, as the Referee has exercised his discretion in favour of defendant, I feel inclined to follow what was done in Moore v. Kennedy, 12 Man. L. R. 173, and uphold the order as to letting the defendant in to defend.

The whole case should not be tried upon an application like the present, and it may be that the Referee discovered a lurking defence where I discovered none.

There should, however, be a term added to the order that defendant should waive his right to security for costs as a condition to being let in to defend.

The costs of this appeal will be costs in the cause.

---

## BRITISH COLUMBIA.

### (VANCOUVER.)

HENDERSON, Co.J. MARCH 31ST, 1905.

COUNTY COURT OF VANCOUVER.

## FORTIN v. POUND.

*Mechanics' Liens—Materials Furnished—Request of Owner—Implication of.*

Action under the Mechanics' Lien Act brought in the County Court of Vancouver for the enforcement of a lien for materials furnished.

The defence was that the materials were not furnished "at the request of the owner."

Section 4 of R. S. B. C. ch. 132, as amended by sec. 7 of the Mechanics' Lien Act Amendment Act, 1900 (statutes of B. C. ch. 20), reads as follows:—

"Unless there is an agreement in writing to the contrary, signed by the person claiming the lien, every con-

Digitized by Google

tractor, sub-contractor, labourer, and furnisher of material, doing or causing work to be done upon, or placing or furnishing any materials to be used in or for the construction, erection, alteration, or repair, either in whole or in part, of, or addition to, any building, tramway, railway, erection, wharf, bridge, or other work, or doing or causing work to be done upon, or in connection with, or the placing or furnishing of materials to be used in or for the clearing, excavating, filling, grading, tracklaying, draining, or irrigating, of any land in respect of a tramway, railway, mine, sewer, drain, ditch, flume, or other work, or improving any street, road, or sidewalk adjacent thereto, at the request of the owner of such land, shall by virtue thereof, have a lien or charge for the price of such work and the placing or furnishing of such materials upon such building," etc.

W. M. Griffin, for plaintiff.

Joseph Martin, K.C., for defendant Pound.

HENDERSON, Co.J.:—Plaintiff brings this action to enforce a lien under the Mechanics' Lien Act in respect of materials supplied and used in the construction of defendant's house.

The defence raised by the owner, the defendant Pound, is that the materials in question if furnished by plaintiff, were not furnished at the request of defendant, and that no cause of action is disclosed under the Mechanics' Lien Act, or otherwise.

The material facts are as follows:—Defendant Pound in or about the month of May, 1904, employed defendant Bellamy to "perform certain work and to furnish certain materials for the erection of a house" on the lands mentioned. Bellamy, the contractor, ordered from plaintiff and plaintiff supplied between 31st May and 3rd September, 1904, certain materials consisting of window sashes, doors, and interior furnishings, amounting to $169.

All these materials with the exception of $3 worth were used in the construction of defendant Pound's house.

Defendant Pound did not personally request plaintiff to furnish the materials in question, but he knew on 13th August, 1904, according to his own admission, that plaintiff was furnishing the same. Bellamy, however, swears that defendant Pound knew in the latter part of June, 1904, that plaintiff was furnishing such materials for the house.

Digitized by Google

Mr. Martin, counsel for defendant Pound, contends that there was no request by Pound, the owner, within the meaning of sec. 4 of the Mechanics' Lien Act, as amended in 1900, and that plaintiff is not entitled to enforce a lien in this action. Mr. Martin cited Anderson v. Godsal, 7 B. C. R. 404.

Mr. Griffin, counsel for plaintiff, pointed out in his argument that if no right of lien exists in this case, no contractor, sub-contractor, or labourer would be entitled to enforce a lien under the Mechanics' Lien Act, unless he received an express request from the owner to perform the work in respect of which he claimed the lien. This contention, I believe, is undeniably correct. But, admitting that it is, this alone would not be sufficient reason to warrant a judgment in plaintiff's favour. It would, however, be sufficient to cause some hesitation before deciding the other way, as such a decision would go far towards rendering the Act, if not a dead letter, at least not the remedy which the legislature evidently intended it should be.

According to my view, the construction placed upon the section by counsel for defendant is a strained construction and not in accordance with the spirit of the Act or within the intention of the legislature. In my opinion, when the owner authorized the contractor to erect the building, there was an implied request on the part of the owner to those persons furnishing material or doing work, at the instance of the contractor, to furnish such material or do such work for the direct benefit of such owner, so as to entitle such persons to avail themselves of the privileges or benefits conferred by sec. 4 of the Act.

I do not think that this view is contrary to the principle of Anderson v. Godsal.

In that case, according to the language of the late Chief Justice McColl, it was admitted "that none of them (i.e., the labourers claiming the lien) worked at the express request of the owner and that no request by him can be implied in the circumstances."

As I have stated, I think it clear that a request can be implied in the present case.

Judgment will therefore be entered for plaintiff with costs.

Digitized by Google

## BRITISH COLUMBIA.

### (VANCOUVER.)

APRIL 28TH, 1905.

FULL COURT.

## CENTRE STAR MINING CO. v. ROSSLAND-KOOTENAY MINING CO.

*Appeal to Privy Council—Leave to Appeal—Amount Involved.*

Motion for leave to appeal to the Privy Council from the judgment of the full Court reported ante p. 313. The parties were the owners of adjoining mines, and by the order sought to be appealed from defendants were restrained from permitting water to flow through certain artificial openings into plaintiffs' mine, and defendants were also ordered to pay plaintiffs $10 damages. It appeared from affidavits used in support of the motion that defendants would be put to an expense of over £300 in obeying the injunction. Rule 1 of the Privy Council Rules of 1887 (see British Columbia Gazette 1888, p. 150) is as follows:—

1. Any person or persons may appeal to Her Majesty, Her heirs and successors, in Her or their Privy Council, from any final judgment, decree, order, or sentence of the said Supreme Court of British Columbia, in such manner, within such time, and under and subject to such rules, regulations, and limitations as are hereinafter mentioned, that is to say, in case any such judgment, decree, order, or sentence shall be given or pronounced for or in respect of any sum or matter at issue above the amount or value of three hundred pounds sterling (£300), or in case such judgment, decree, order, or sentence shall involve, directly or indirectly, any claim, demand, or question to or respecting property or any civil right amounting to or of the value of three hundred pounds sterling (£300), the person or persons feeling aggrieved by any such judgment, decree, order, or sentence may within 14 days next after the same shall have been pronounced, made, or given, apply to the said Court by motion or petition for leave to appeal therefrom to Her Majesty, Her heirs and successors, in Her or their Privy Council.

Digitized by Google

The motion was heard by HUNTER, C.J., MARTIN and DUFF, JJ.

C. R. Hamilton, K.C., for the motion.

Sir Charles Hibbert Tupper, K.C., contra, contended that, as the judgment on its face was for only $10, the Court could not grant leave to appeal: that it was not permissible to go outside the record to ascertain the amount in controversy; and where anything remains to be shewn by affidavit the leave must be obtained from the Privy Council.

THE COURT granted leave to appeal.

---

## BRITISH COLUMBIA.

### (VANCOUVER.)

DUFF, J. MAY 16TH, 1905.

CHAMBERS.

### COOPER v. YORKSHIRE GUARANTEE CO.

*Costs—Increased Counsel Fee—Time for Applying.*

Application for an increased counsel fee for plaintiff's counsel.

Roland, for application.

V. Larsen, contra, took the preliminary objection that notice of taxation had been given and served, and it was now too late to make the application.

DUFF, J., overruled the objection, saying that he could see no principle upon which such an application should not be made either pending taxation or even after conclusion of taxation.

Digitized by Google

## NORTH-WEST TERRITORIES.

APRIL 19TH, 1905.

### SUPREME COURT IN BANCO.

### ROSS BROTHERS LIMITED v. PEARSON.

*Bankruptcy and Insolvency—Chattel Mortgage by Insolvent Debtor—Registration—Bills of Sale Ordinance—Preferential Assignments Ordinance—Absence of Intent to Defeat Creditors—Pressure—"Which has such Effect."*

Appeal by defendant from judgment of SIFTON, C.J., in favour of plaintiffs (claimants) in an interpleader issue. Plaintiffs were the holders of a chattel mortgage made by one James B. Twiss on a steamboat. Defendant was an execution creditor of Twiss, who caused the steamboat to be seized by the sheriff under execution, when it was claimed by plaintiffs. The sheriff interpleaded, and the issue was directed.

The appeal was heard by WETMORE, SCOTT, and PRENDERGAST, JJ.

J. S. Cowan, Edmonton, for defendant, appellant.

W. Short, Edmonton, and O. M. Biggar, Edmonton, for plaintiffs.

SCOTT, J.:—There is no specific finding of facts by the trial Judge, but from the evidence it appears that in the month of November, 1903, Twiss was indebted to plaintiffs in the sum of $759 or thereabouts; that Fred. Ross, who, apparently from the affidavit of bona fides on the chattel mortgage, was the president of the plaintiff company, saw Twiss and told him that some word had come about some rafts Twiss had in the river, and at Ross's suggestion Twiss went down to plaintiffs' office to see what information there was about them; that while he was at the office, Dowsett, the plaintiffs' bookkeeper, asked for security for the indebtedness by way of mortgage to deposit with the bank as collateral security. Twiss apparently consented, and he and Dowsett went to the plaintiffs' advocates, where the mortgage was drawn and executed. At the time the mortgage was executed

Digitized by Google

Twiss made a statutory declaration in which he solemnly declared inter alia that the mortgaged chattels were worth $2,000 and that his total liabilities did not exceed $1,500. It appears also that Twiss before making this declaration thought and stated that his liabilities did not exceed $1,000, and that the boat was worth $2,500, but that at the advocates' suggestion, for the purposes of the declaration, the liabilities were increased and the assets decreased to the amounts specified.

It also appeared from the evidence that the value of the steamer at public auction would not exceed $700 or $800, and that it and a scow worth $100 or $120 were the only property of Twiss, and that at the time he signed the mortgage his liabilities amounted to $2,500 or $2,600.

From this evidence it appears clear that at the time the mortgage was given Twiss was in insolvent circumstances, being unable to pay his debts in full; but there is nothing to suggest that he was other than honest in making the statutory declaration; like many another man he was appreciating his property at more than its worth and putting too low an estimate on his own liabilities, with the result that he supposed he was solvent.

The appellant bases his appeal on the grounds: (1) that there was no evidence to shew that there was a chattel mortgage that would satisfy the Bills of Sale Ordinance; C. O. 1898 ch. 43; (2) that if there was such a chattel mortgage, it is void under the Ordinance respecting Preferential Assignments, C. O. 1898 ch. 42.

The first ground was not taken at the trial, and I am of opinion that it is not open to the appellant now. In the course of the evidence plaintiffs proposed to prove the mortgage by the production of the unregistered duplicate, which was objected to on the ground that it was not the original which was on file, which latter was then put in, and no further objection was made, and the trial apparently proceeded on the assumption that all that was necessary was proved. The issue, moreover, states that plaintiffs are "mortgagees under a certain chattel mortgage from the said James B. Twiss to them, which said chattel mortgage is dated 7th November, 1903, and was registered on 9th November, 1903."

It is contended, however, that the statement of registration does not admit the execution or the existence of the

Digitized by Google

necessary affidavits. Sections 5 and 10 of the Bills of Sale Ordinance shew that the registration required by the Ordinance is the registration of the mortgage with the necessary affidavits, and the mortgage, therefore, could not be registered in accordance with the Ordinance without the necessary affidavits, and the statement in the issue, I think, must be construed as admitting that plaintiffs were mortgagees under a chattel mortgage duly executed and registered in accordance with the law.

There being, therefore, no valid grounds of objection under the Bills of Sale Ordinance, it becomes necessary to consider whether the mortgage is void under ch. 42.

The 1st section of this Ordinance is as follows: "Every gift, conveyance, assignment, or transfer, delivery over or payment of goods, chattels, or effects, or of bonds, bills, notes, securities, or of shares, dividends, premiums, or bonus, in any bank, company, or corporation, made by any person at any time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the eve of insolvency, with intent to defeat or delay or prejudice his creditors or to give to any one or more of them a preference over his other creditors or over any one or more of them, or which has such effect, shall as against them be utterly void."

In Molsons Bank v. Halter, 18 S. C. R. 88, a similar provision of the Ontario Act, and in Stephens v. McArthur, 19 S. C. R. 446, a similar provision of the Manitoba Act, were under consideration by the Supreme Court of Canada, and the conclusions arrived at were confirmed in Gibbons v. McDonald, 20 S. C. R. 587, and these conclusions are binding on this Court.

In Stephens v. McArthur the Manitoba Court, 6 Man. L. R. 496, prior to the judgment in Molsons Bank v. Halter, had declared the mortgage void because it had the effect of delaying or defeating creditors or preferring one creditor to another; Taylor, C.J., saying with reference to the words "or which has such effect:" "The construction to be put on these words cannot be said to be settled by authority. They must have some meaning. The legislature must have introduced them in to the Act for some purpose. I cannot on a full consideration of them come to any other conclusion than that a conveyance which has the effect of delaying or defeating creditors or preferring one creditor to another is void equally with one executed with the intent to do so."

Digitized by Google

The Supreme Court, however, in the cases mentioned decided that the words "which have such effect" apply only to the giving of a preference, and not to the defeating, delaying, or prejudicing of creditors, and that the word "preference" has the same meaning that had been given to it in the Bankruptcy Acts, viz., a spontaneous act of the debtor of benefiting one creditor over others. Gwynne, J., in Molsons Bank v. Halter says (p. 102): "To constitute a preference it must have been given by the insolvent of his own mere motion and as a favour or bounty proceeding voluntarily from himself." As a "preference," thus interpreted, involved an intent, the words "or which has such effect" would appear to be at least superfluous, and the Court declared that they were merely intended to include indirect methods of preference.

It had been held in the Ontario Courts in many cases, though perhaps not with emphatic distinctness, that to avoid a conveyance on the ground of intent it was necessary to shew not merely that the creditor knew of the debtor's financial condition, but also that there was a concurrence on his part in the intent. Of the different cases I may mention Barnes v. McKay, 10 O. R. 167; McRoberts v. Steinhoff, 11 O. R. 369; Johnson v. Hope, 17 A. R. 10; and Ashley v. Brown, ib. 504. In McRoberts v. Steinhoff, at p. 372, Cameron, C.J., says: "I have recently held in a similar case that I could not on mere suspicion hold that the plaintiff knew of his mortgagor's insolvency. It he did not, as I understand the authorities, there being a bona fide debt to be secured, the mortgage cannot be invalidated simply because the debtor was insolvent and intended to give him a preference. To avoid the transaction under R. S. O. ch. 118, there must be a concurrence of intent on the part of the debtor and creditor taking the mortgage."

The Supreme Court in Gibbons v. McDonald affirmed this view. Ritchie, C.J., at p. 589 states: "That case (Molsons Bank v. Halter) disposes of the present, in which there was no concurrence of intent on the one side to give and on the other to accept a preference over other creditors, inasmuch as there was nothing to shew that the defendant was aware of the insolvency of the debtor, and there is nothing in the evidence to suggest any bad faith or collusion between the defendant and his debtor."



Digitized by Google

In a recent case in the Manitoba Courts, Schwartz v. Winkler, 13 Man. L. R. 493, Killam, C.J., declines to accept this view of the law, stating that the contrary view was taken by the Manitoba Court in Stephens v. McArthur, by which he felt bound, inasmuch as the reversal of the decision by the Supreme Court was on another ground and did not touch that position. I confess myself quite unable to understand this position of Killam, C.J., for, as above pointed out, the decision of the Manitoba Court in the case mentioned was on the "effect" and not "the intention:" and the judgment in Gibbons v. McDonald in the Supreme Court is not referred to by Killam, C.J., and may have been overlooked.

It appears clear, therefore, from these decisions that if the intent is not participated in by the creditor the conveyance cannot be set aside.

In the Supreme Court cases above mentioned what is known as the doctrine of "pressure" was under discussion, and applied in the determination arrived at, the same result being reached as under the meaning given to the word "preference." This doctrine was one of very long standing, and, shortly stated, meant that where the moving cause inducing the debtor to make conveyance was some pressure, force, demand, or request coming from the creditor, the word "intent" being deemed to mean "motive," there could be no "intent" to defeat or delay creditors or prefer one to another because the "motive" or "intent" was shewn to be the satisfying of the demand or the getting rid of the pressure. The doctrine even in this form had been settled for years. In the case of Johnson v. Fesemeyer, 25 Beav. 88, 14 English Rep. 1174, Lord Chelmsford, L.C., says at p. 1178: "Formerly it was supposed that in order to prevent a transaction being void as a fraudulent preference it was necessary to shew something like coercion or pressure on the part of the creditor, and a reluctant yielding by the debtor. The term 'pressure' has been retained although it is now only calculated to mislead, as it has been decided that the only question in cases of this description is whether the Act is voluntary on the part of the bankrupt."

Applying these conclusions to the present case, it appears to me that under the section mentioned the mortgage cannot be set aside, because there was "pressure" and because there was no knowledge on the part of the plaintiffs of Twiss's insolvency shewn, and, although Fred. Ross states that he had

Digitized by Google

heard that Twiss's men had had some difficulty in getting their wages, as Cameron, C.J., said in McRoberts v. Steinhoff, the Court will not infer knowledge from mere suspicion. The plaintiff thus being unaware of the insolvency of the debtor, there would be no concurrence, and indeed the evidence, in my opinion, clearly justifies the conclusion that the debtor himself was unaware of his insolvency.

Then the question arises whether the mortgage can be declared void under sec. 2, which is as follows: "Every such gift, conveyance, assignment, transfer, delivery over, or payment, whether made owing to pressure or partly owing to pressure or not, which has the effect of defeating, delaying, or prejudicing creditors, or giving one or more of them a preference, shall, as against the other creditors of such debtor, be utterly void."

Mr. Biggar, counsel for the respondents, in an exceedingly able argument, contended that the only effect of this section was to destroy the defence of "pressure," and that in other respects the law remained unchanged, it being still necessary to shew a fraudulent intent, and that in this case there was no concurrence of intent or even any intent on the part of either to defraud or give a preference.

It is not contended of course that a conveyance is void under sec. 1, though made with the intent specified, unless it has the effect, and he therefore argues that to give sec. 2 the wide meaning contended for by the appellant and which the words seem to bear, would make it include everything in sec. 1, which would therefore be meaningless, and that the legislature could not have intended this.

The expression "such conveyance" clearly indicates a reference to something before, that is to say, to sec. 1, and the conveyance mentioned in sec. 1 is "a conveyance . . . made by a person in insolvent circumstances . . . with intent to defeat . . . creditors or to give a preference."

If the word "such" is intended to convey all the qualification contained in sec. 1, it would therefore mean "any conveyance . . . made by a person in insolvent circumstances . . . with intent to defeat creditors . . . or of giving a preference . . . is void."

With this interpretation the second section seems to mean exactly the same as the first, and one or other is meaningless, and, as the respondents' counsel contends, the legislature could hardly have intended this.

Digitized by Google

If, however, the word "such" is intended only to apply the first qualification of the word "conveyance," the section would mean "any conveyance . . . made by a person in insolvent circumstances . . . which has the effect of defeating creditors or of giving a preference is void," and a reasonable meaning is given to the section, which seems to be an extension of what is comprised in sec. 1. The argument, however, is that the introduction of the words "whether made owing to pressure, or partly owing to pressure or not," shew that this is what is aimed at. There appears to be no doubt whatever that the legislature had in view this doctrine of "pressure" and intended to destroy it as a defence, but the form of words used indicates to my mind that it did not intend to confine itself to that. If the form of words used had been "notwithstanding the existence of pressure" or "even if there has been pressure," the argument would, to my mind, have more force, but the expression used is the same as "whether there has been pressure or whether there has not been pressure," and, though clearly pointed at the doctrine of pressure, cannot be limited to that.

In my opinion, the history of the legislation and its judicial interpretation support this conclusion.

Section 1 is taken from a section of the Ontario or Manitoba Act in almost identical words. The words "or which have such effect" were not originally in the Ontario Act. They were subsequently inserted no doubt for some purpose.

It was held in Manitoba in Stephens v. McArthur, 6 Man. L. R. 496, confirming the judgment of Mr. Justice Bain, that under these words the effect was what was to be considered, and not the intent. The full Court which gave the judgment consisted of Taylor, C.J., and Killam and Dubuc, JJ., the two former of whom gave written judgments, in which Dubuc, J., concurred.

I have already quoted from a judgment of Taylor, C.J., shewing the view taken. In Ontario a similar view had been taken by the Queen's Bench Divisional Court in River Stave Co. v. Sill, 12 O. R. 557, Armour, J., in his judgment, at p. 567, stating: "The object and intention of the Legislature was to compel as far as it had power all persons in insolvent circumstances . . . to treat all their creditors alike by making such a disposition of their assets as would pay all their creditors their just debts ratably and proportionately and without preference or priority. I think that

Digitized by Google

in applying this Act we have only to ascertain whether the person who has made any gift, conveyance, assignment, etc., was at the time in insolvent circumstances . . . and if so what is the effect of such gift . . . and if its effect is to delay or prejudice his creditors or to give any one or more of them a preference over his other creditors or over any one or more of them, to declare such gift . . . as against them to be utterly void."

Then came the case of Molsons Bank v. Halter, in which the Ontario Court of Appeal, 16 A. R. 323, by a majority, Osler, J.A., dissenting, decided that the words "or which has such effect" did not mean what the other Judges had supposed them to mean, and that they in fact added nothing. This was confirmed, as I have pointed out above, by the judgment of the Supreme Court by a majority of three to two, Strong, Taschereau, and Gwynne, JJ., constituting the majority, and Fournier and Patterson, JJ., dissenting. This, then, was the state of the law as interpreted by the Courts under sec. 1 when sec. 2 was passed by the legislature in 1897. It must be assumed that by the passing of it the legislature intended to accomplish some change in the law, and we have to determine what that change was. At this time it is clear from sec. 3 and from the provisions of the Creditors Relief Ordinance that the law at least encouraged the ratable distribution between his creditors of the assets of an insolvent debtor. Then sec. 2 is passed, and it appears to me that the natural meaning of its words is very clear, viz., that the effect of the conveyance and not the intention of the parties is what is to be considered, and that that construction is entirely in harmony with what the legislature might be deemed to desire in the way of changing the law, and if it wished this effect I can conceive of no plainer way in which it could have expressed its intention. As above indicated, all of the Judges who considered that the words "or which has such effect" applied to the defeating, delaying, or prejudicing of creditors considered that even by these words this result had been accomplished, and even though the result of this construction may be that all that is contained in sec. 1 is comprised in sec. 2, yet the first construction put on the words "or which has such effect" was to make the provisions regarding "intent" unnecessary and unmeaning, and it does not appear to me at all unlikely that the legislature, considering the difficulty of amending sec. 1 so as to carry out

Digitized by Google

its intention, concluded to make an entirely new section containing the law as it wished it, but without repealing the old section. To my mind, while it would be unreasonable to suppose that an amending provision of the law contained nothing that was not contained in the old law before, unless passed to make more clear the existing law, because it is only fair to assume that when the legislature amends it means to change, yet it would not appear at all unlikely that the amending provision itself might contain all of the previous law as well as the change.

For the reasons stated, I am clearly of opinion that under sec. 2 any conveyance made by a debtor in insolvent circumstances which has the effect of defeating, delaying, or prejudicing his creditors, is void, and that that was the effect in the case before us, and that therefore the chattel mortgage should be declared void. The appeal, therefore, should be allowed with costs and the judgment appealed against set aside with costs and judgment entered declaring the chattel mortgage in question void as against defendant.

WETMORE, J., gave reasons in writing for the same conclusion.

PRENDERGAST, J., also concurred.

---

## NORTH-WEST TERRITORIES.

APRIL 19TH, 1905.

SUPREME COURT IN BANCO.

### IRELAND v. ANDREWS.

*Pleading—Action on Promissory Note—Defence—Illegality—Failure to Set forth Necessary Facts — Striking out — Amendment.*

Appeal by plaintiff from order of NEWLANDS, J., allowing defendant to enter judgment dismissing the action upon the defence in law raised by parapragh 3 of the statement of defence.

N. Mackenzie, Regina, for plaintiff.

F. L. Embury, Regina, for defendants.

Digitized by Google

The judgment of the Court was delivered by

WETMORE, J.:—The action is brought on a promissory note alleged to have been made by defendants in favour of the Sawyer and Massey Company and indorsed by them to plaintiff.

Defendants pleaded: (1) That they did not make the note. (2) If they did, it was made on account of a certain named thresher to be delivered by the company to the defendants, and that the company failed to deliver the same, and that the note was indorsed to the plaintiff without consideration and with notice of the above facts and when overdue. (3) "The said Sawyer and Massey Company Limited are a foreign company engaged in the sale for gain of separators and engines and horse powers in the North-West Territories, by resident agents, and are not a registered company under the provisions of the Foreign Companies Ordinance, being chapter 22 of the Ordinances for the North-West Territories for 1901, and the said note was indorsed to the plaintiff with notice of the facts mentioned in this paragraph, and the plaintiff will take the benefit of provisions of the said the Foreign Companies Ordinance."

The plaintiff applied and took out a summons to strike out the whole of these defences, on the ground that they are frivolous and vexatious and disclose no reasonable answer to the plaintiff's claim. This summons was evidently taken out under Rule 151 of the Judicature Ordinance. The learned Judge very properly refused to strike these defences out under that Rule, and then some understanding was had by which the motion was converted apparently into an application to dispose of the question of law under Rule 149. Whatever was done there, however, was done at the instance of the plaintiff, but there seems to have been a misunderstanding all round. The facts and circumstances are not clearly explained, and I do not feel that this Court is in a position to deal with the matter satisfactorily. The result of the application was that the learned Judge held the 3rd paragraph a good defence and gave final judgment for defendants in the action with costs.

I am of opinion that this was erroneous in any circumstance, as the plea set forth matters of fact which were controverted by issue being joined, and, even although it was a good plea, before defendants could succeed finally upon it

Digitized by Google

the facts set forth would have to be established. But the paragraph is bad because it does not set forth all the facts necessary to be set forth in order to make it a good plea. As, for instance, that the sale or transaction upon which the note was based was had or made within the Territories. The sale might have been at Winnipeg for all we know, and, if so, a note given for the price of the article would be a good note although made in the Territories. In that case there would be no contravention of the Foreign Companies Ordinance. This point was not raised before the learned Judge and was first taken on this appeal.

The real state of facts as to what took place before the learned Judge is in such an unsatisfactory condition that I do not feel justified in disposing of this appeal of the question which might arise on a properly pleaded plea of the sort. I think substantial justice will be done, in the circumstances, by ordering that the 3rd paragraph pleaded be struck out, the plea not being a good one for the reasons I have stated, and that defendants have leave to file an amended paragraph as they may be advised. When this is done the learned Judge below and this Court, if there should be an appeal from him, would be then in a position to decide the question without any confusion in the matter. In the circumstances there will be no costs of the application before the Judge or of this appeal.

---

## NORTH-WEST TERRITORIES.

APRIL 19TH, 1905.

SUPREME COURT IN BANCO.

### REX v. CHARLES KING.

*Criminal Law—Murder—Absence of Direct Evidence—Corpus Delicti — Presumption of Death — Counsel for Crown—Right of Reply — No Evidence on Behalf of Prisoner—Prisoner not Giving Evidence on his own Behalf—Comment of Crown Counsel — Crown Case Reserved — New Trial.*

Crown case reserved.

C. de W. MacDonald, Edmonton, for the Crown.

O. M. Biggar, Edmonton, for the prisoner.

Digitized by Google

NEWLANDS, J.:—After the conviction of the prisoner for murder in this case three questions were reserved for the opinion of the Court by the trial Judge: (1) Whether there was evidence which should have been allowed to go to the jury, there being no direct evidence either of an act of the prisoner's likely to cause death, or of the fact of death itself, and no convincing presumption of death being raised.

(2) Whether counsel for the Crown should have been allowed the right to reply, no evidence having been tendered on behalf of the prisoner.

(3) Whether the comment by counsel for the Crown in the course of his address to the jury with regard to the prisoner's not giving evidence on his own behalf was proper.

The first question is a very serious one, and is founded upon the general rule that the fact that an offence has been committed must be fully established before any one can be held to answer for it. This rule, as applied in murder cases, is laid down by Sir Matthew Hale, 2 Hale's P. C. 290, where he says, "I would never convict any person of murder or manslaughter, unless the fact was proved to be done or at least the body found dead."

This rule is said by Maule, J., in R. v. Burton, Dears. C. C. 282, to be a rule of caution rather than of law or evidence, and circumstances may be sufficiently strong to shew the fact of the murder though the body has never been found. In R. v. Hindmarsh, 2 Leach 569, the prisoner, the mate of a vessel, was indicted for the murder of his captain at sea, and a witness stated that the prisoner had proposed to kill the captain, and that the witness, being afterwards alarmed in the night by a violent noise, went upon deck and there observed the prisoner take the captain up and throw him overboard into the sea, and that he had not been seen or heard of afterwards; and that near the place on the deck where the captain was seen, a billet of wood was found, and that the deck and part of the prisoner's dress were stained with blood. The Court, though they admitted the general rule of law, left it to the jury to say on the evidence whether the deceased was not killed before his body was cast into the sea, and the jury being of that opinion the prisoner was convicted and the conviction sustained.

In R. v. Cheverton, 2 F. & F. 833, the prisoner was indicted for murdering an infant child, and the evidence was the prisoner's statement to a police officer that the father of the

Digitized by Google

child had written for it and she had sent it to him at Ipswich by a woman at the railway station, Colchester, and there was also evidence that she had been seen on 4th July going in a direction which might be towards the river or towards the station with something which to the witnesses seemed like a child of about the age of the missing infant, and that on the next morning a body of an infant child of the same sex and (so far as appeared) about the same age was found dead in the river. It appeared that this child had died from drowning, but there was no other evidence, otherwise than before mentioned, to identify it with the prisoner's child. Erle, C.J., left the case to the jury on this evidence, and after telling them the rule laid down by Sir Matthew Hale, asked them, "On the whole evidence are you satisfied that the body found in the river was the prisoner's child and that it was put there by her?" The jury brought in a verdict of not guilty.

In R. v. Hopkins, 8 C. & P. 591, where a girl was indicted for the murder of her infant child by drowning, Lord Abinger, C.B., directed the jury to acquit, as the child found drowned was proved not to be the child of the prisoner, and he said with respect to the child, which was really the child of the prisoner, she cannot, by law, be called upon either to account for it or to say where it is, unless there be evidence to shew that her child is actually dead.

In R. v. Clowes, 4 C. & P. 221, the alleged murder took place in 1806, and in 1829 bones were found buried under a barn which the prisoner had occupied. The finding of the bones was proved, and the wife of the deceased identified a carpenter's rule and the remains of a pair of shoes which were found in the place where the bones were discovered, and she also identified the skull of the deceased by something remarkable about the teeth. This evidence was left by Littledale, J., to the jury, who brought in a verdict of acquittal.

The same rule is followed by the Courts in the United States. In the People v. Palmer, 119 N. Y. 110, the Court reviews the principal English and American decisions and comes to the conclusion that the rule is the same in both countries, and that the penal code of that State, which provides that "no person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed, and the fact of the killing by the defendant as al-

Digitized by Google

leged, are each established as independent facts, the former by direct proof and the latter beyond a reasonable doubt," did not change the rule of the common law but was only for the purpose of declaring that rule in explicit terms. In that case the defendant was indicted for the murder of one Peter Bernard. A dead body was found, alleged to be that of Bernard. There was no direct proof of that fact, and it was sought to be established by circumstances, among others, that articles were found on or near the body which resembled articles shewn to have been the property of and in the possession of Bernard before he disappeared. One witness testified that he made for Bernard a boot taken from the foot of the dead body. A satchel was found near the body in which was an almanac on which the name of "Bernard" was written. A witness identified it as Bernard's, and testified that he had seen Bernard write, and thought the same was in his hand-writing. Keys on the body fitted the lock of the satchel. Various articles of clothing found on the body were also identified as belonging to Bernard. The body was in a decomposed and unrecognizable condition. Upon this evidence the jury convicted the prisoner of murder, and this conviction was reversed by the Court of General Term because there was no direct evidence which identified the body found as that of the person alleged to have been murdered. This decision was reversed by the Court of Appeals and the verdict of the jury sustained. . . .

In this case the evidence was to the effect that the prisoner and Edward Hayward had arrived in Edmonton together on 14th August, 1904, and had then purchased a packing outfit there and set out overland by way of the Swan Hills for Lesser Slave Lake. They arrived at the Sucker Creek Indian Reserve, on the border of Lesser Slave Lake, on or about 16th September, 1904, and went into camp at a point not far distant from the nearest house and the main travelled road from the Indian settlement to the English settlement and Hudson's Bay Fort, along which were some 8 or 10 houses in which there was a population of some 60 or 70 Indians. They remained there for at least 3 days, on the first 2 of which they were visited by several Indians, who saw there many of the articles purchased in Edmonton. On the night of the day preceding the prisoner's departure from the camp a sound as of a gun shot was heard apparently from the direction of the camp, but between the afternoon of that

Digitized by Google

day and such departure there appear to have been no Indians at the camp, but two paid a visit to the locality and were at the camp fire shortly after they had seen the prisoner leaving with the horses and the outfit. On that evening the prisoner camped opposite the main settlement, where the trader's stores are, and shortly after went across to that settlement, where he remained until 9th October without being in any way molested. He disposed of the outfit, and while waiting for a boat to Athabasca Landing and the larger portion of the purchase money, was interviewed by the police on 9th October with regard to the disappearance, which they state the Indians had suggested, of his partner, and on the 10th was taken into custody. He then had in his possession some $65 and had received in part payment $55.75.

On 8th October search was made, under the direction of the sergeant of police, at the camp, and there were found the traces of a very large fire. In it were discovered, on that and subsequent days, many pieces of charred bone, of which 4, fitting together and constituting a piece about 5 centimetres by 7 centimetres, were identified as the upper posterior angle of the right parietal bone of a human skull, and a 5th as the jugular process of a human occipital bone. There were also found portions of various organs, heart, lung, liver, pancreas, etc., which were shewn to be similar in structure and corresponding to human organs, though not positively identified as human. It was, however, stated in the medical evidence that the fact that each of these fleshy structures did resemble human organs and that they were found together and with the human bones, was almost convincing evidence that they had all been human.

In addition there was found in the ashes a considerable number of what appeared to be eyelets of boots, buttons, buckles, and other metal parts of clothes. In the slough, distant 450 feet from the camp fire in question, was found a pair of miner's hob nailed boots, identified by witnesses as those the prisoner's companion had previously worn, and tied up in a rag, stuffed in the toe of one of these boots, which was laced up and tied to the other, were a number of articles, including a gold sovereign case, a set of miner's scales and weights, a gold nugget necktie pin, an exploded 45 calibre rifle cartridge, and a number of other smaller articles. The necktie pin, the sovereign case, the miner's scales and weights, were identified by the brother of the supposed deceased as

Digitized by Google

having been his property. There was also evidence of contradictory statements as to the man who was with him, as to his name and what had become of him, that search was made in the direction in which he was said to have gone, but no trace of him was found.

This evidence shews that the remains of a human being had been destroyed by fire at the camp fire where the prisoner and Hayward had camped on the Indian Reserve. The finding of two portions of a human skull, a part of the right parietal bone, and the jugular process of the occipital bone, is absolute proof of the fact that the human being to whom they belonged is dead. There is therefore direct proof of the death of a human being, and once having established the fact of death by direct evidence it would be a monstrous doctrine if circumstantial evidence could not be given as to who that dead person was, simply because the murderer had so destroyed the remains that identification was impossible. The cases I have cited shew that that is not and never was the law, but that, once the fact of death is established, circumstantial evidence can then be given to prove the identity of the remains and also the identity of the person who caused the death. Besides the evidence which I have referred to, there was considerable other evidence, all of which tended to prove that the dead man was Hayward and that he was murdered by the prisoner. It was, I think, properly left to the jury and on this ground their verdict should not be disturbed.

2nd. Had the counsel for the Crown the right to reply, no evidence having been tendered on behalf of the prisoner? Generally the Crown prosecutors in the Territories are under general instructions from the Department of Justice, over which the Attorney-General for Canada presides. The administration of criminal law in the Territories is in his hands, and the Crown prosecutors act for him in prosecuting. This case is made stronger by the fact that the Crown counsel had express instructions to act. This same question was decided in favour of the right to reply under the same circumstances in Rex v. Martin, 5 O. W. R. 317, and I am of opinion that it should be so decided in this case.

3rd. Was the comment by the counsel for the Crown in the course of his address to the jury with regard to the prisoner not giving evidence on his own behalf proper?

Digitized by Google

The Canada Evidence Act, sec. 4 (2), reads: "The failure of the prisoner charged or of the wife or husband of such prisoner to testify shall not be made the subject of comment by the Judge or by the counsel for the prosecution in addressing the jury."

The reference in this case by the Crown prosecutor was as follows: "Now we are confronted with another aspect of the case here which I shall have to handle in a gingerly way. It is familiar, I suppose, to you, gentlemen of the jury, that the Crown is expressly forbidden, as a matter of good ethics, to comment upon the prisoner not giving evidence. Nowadays prisoners are allowed to give evidence on their own behalf, and the fact that they don't give evidence in their own behalf is sometimes used against them by juries. I think his counsel took the very best and wisest course in not having him go on the stand, and I think it is wise for himself." By these remarks the Crown counsel not only pointed out to the jury that the prisoner had the right to give evidence and did not, but that any evidence he could have given would have been unfavourable to him. It is certainly a direct comment on the fact of his not having given evidence, was unfavourable to the prisoner, and is directly contrary to the statute.

In The Queen v. Corby, 1 Can. Crim. Cas. 457, decided in the Supreme Court of Nova Scotia, Weatherbe, J., said: "While the statute remains as it is I see no effectual remedy for the prisoner against the violation of it unless we hold the trial to be irregular in all such cases. I see no other mode of interpreting the statute."

Ritchie, J., said: "When once comment is made the mischief has been done, and nothing can afterwards be said by either counsel or Judge that will be calculated entirely to remove the effect of that comment upon the minds of the jury. The accused is entitled to the protection the law has thus afforded him, and it can only be done by granting a new trial." In The Queen v. Coleman, 2 Can. Crim. Cas. 523, decided by the Court of Appeal for Ontario, Chief Justice Meredith said: "The prisoner has the right to have the case submitted to the jury without comment on his failure to testify, either by the Judge or the counsel for the prosecution in addressing the jury, and he has been deprived of that right. The legislature must have deemed it of importance to accused persons that no such comment should be made, and the deprivation of that right must, I apprehend, be held to be a substantial wrong to the accused."

Digitized by Google

Rose, J., said: "It is not our duty in this case to direct a new trial notwithstanding 'that something not according to law was done at the trial' unless in our opinion 'some substantial wrong or miscarriage was thereby occasioned on the trial.' It is certainly clear that something not according to law was done at the trial; and, in my opinion, a substantial wrong was occasioned, for the prisoner was entitled to a trial free from comment or observation upon the fact that he did not tender himself as a witness. He had the right to refrain from giving evidence without his failure to testify being made the subject of comment. He had a statutory right. That right he was deprived of, and being deprived of that right by the learned Judge, a wrong was occasioned, and I think a very substantial wrong, and a wrong that, in my opinion, could not be removed or remedied by the learned Judge calling back the jury and telling them that he had done wrong, as he did do: for in stating what he did to the jury he of necessity repeated the offence of which complaint has been made." And in The King v. Hill, 7 Can. Crim. Cas. 38, the Supreme Court of Nova Scotia decided that the provision of the law that no comment should be made was mandatory.

The King v. Aho, 8 Can. Crim Cas. 453, decided by the Supreme Court of British Columbia, was cited by the respondent's counsel, but in that case the Court only held that what was said did not amount to a comment on the failure of the accused to testify.

In the case before us I am of opinion that what the counsel said to the jury was a comment forbidden by the statute, and one that was distinctly unfavourable to the prisoner. This comment having been made, his explanation afterwards does not improve matters, but would rather impress on the mind of the jury the fact that the prisoner offered no explanation of the facts brought out in evidence against him.

It is further contended by the counsel for the Crown that this Court should not set aside the conviction unless some substantial wrong or miscarriage of justice was thereby occasioned on the trial. All the Judges whose opinions I have cited were of the opinion that such a comment was a substantial wrong to the prisoner. This opinion is also supported by the decision of the Privy Council in Makin v. Attorney-General for New South Wales, [1894] A. C. 57. A provision in the Criminal Law (Amendment) Act, 1883,

Digitized by Google

provided that no conviction should be set aside unless for some substantial wrong or miscarriage of justice. Evidence that was inadmissible had been allowed to go to the jury, but it was contended that without that evidence there was sufficient evidence to convict, but the Court held that the jury might have been influenced by the evidence improperly admitted, and that substantial wrong would be done to him if he were deprived of a verdict of the jury and there was substituted for it the verdict of the Court founded merely upon the perusal of the evidence.

It is impossible for us to say how the jury were affected by the comment made by the Crown counsel, and it would be doing substantial wrong to the prisoner to deprive him of a trial by jury as provided by law entirely uninfluenced by any such comment.

I think the conviction should be quashed and a new trial ordered.

PRENDERGAST, J., gave reasons in writing for the same conclusions as NEWLANDS, J.

WETMORE, J., gave reasons in writing in favour of the prisoner upon all the questions reserved.

---

## NORTH-WEST TERRITORIES.

APRIL 19TH, 1905.

SUPREME COURT IN BANCO.

### EGGLESTON v. CANADIAN PACIFIC R. W. CO.

### DUGGAN v. CANADIAN PACIFIC R. W. CO.

*Railway—Cattle on Track—Destruction of, by Train—Negligence of Engine-driver — Evidence — Trespass—Fences—Damages.*

Appeal by defendants from judgment of SCOTT, J., in favour of plaintiffs in actions for damages for loss of horses by the negligence of defendants.

J. A. Lougheed, K.C., for defendants.

C. De W. MacDonald, Edmonton, for plaintiffs.

Digitized by Google

The judgment of the Court (SIFTON, C.J., NEWLANDS, and HARVEY, JJ.), was delivered by

HARVEY, J.:—On 20th July, 1902, a train belonging to defendants ran over and killed or fatally injured 44 horses belonging to plaintiffs near Wetaskiwin in the district of Alberta. Actions were brought for damages, which were tried together before Mr. Justice Scott without a jury, and judgment was given by him in favour of both plaintiffs, on the ground that the accident was due to the negligence of defendants' servants in the management of the train.

On the trial 34 witnesses were examined, and there was a great deal of conflicting testimony. The rule as to the reviewing of the findings of the trial Judge by a court of appeal is laid down in Village of Granby v. Menard, 31 S. C. R. 14, where Gwynne, J., says: "In a case like the present, where the trial Judge, who has heard all the witnesses give their evidence before him, and who has thus had an opportunity which no court of appeal can have, of estimating the credibility of the several witnesses and the value of all their evidence, has rendered his judgment, no Judge sitting in review of or in appeal from that judgment, upon matters of fact, ought to reverse that judgment unless it is shewn to be clearly wrong upon the evidence so taken." It appears perfectly clear from this case that if there is any reasonable evidence to sustain the findings of the trial Judge as to the facts, they should not be disturbed by this Court.

The trial Judge has found that there was negligence on the part of the engine-driver, and that that negligence was the cause of the accident. It appears to me then that the only question for this Court to consider is: Was there any reasonable evidence to support this finding, and, if so, and it is thus established, are defendants thereby liable?

A large band of horses, of which the killed ones were a part, on the night in question were on the prairie a short distance from the railway in the charge of two men, who, however, made no attempt to herd them, but left them to wander about at will. These horses wandered on the track, and the trial Judge finds, on evidence which is not in any way contradicted, that they came on the track at least 500 yards north of the point where the engine of the train came to a standstill, and that they ran along the track southward in the same direction as the train was going, the evidence



Digitized by Google

shewing that there were a great many tracks all pointing southward, and that pieces of wood were broken out of the ties and pieces of earth thrown about as from flying hoofs. The evidence of nearly all the witnesses is that it was a bright moonlight night, and that objects could be distinguished at a distance of from a quarter to half a mile. The engine-driver states that he ran out of the moonlight into a fog, and at the moment he ran into the fog he struck the horses all bunched together, and that he then put on the emergency brake and stopped the train within a distance of 140 or 150 feet. There is evidence that killed or helplessly crippled horses were found back at various distances reaching several hundred feet to the rear of the forward part of the engine, and most of the evidence is to the effect that the injury to the horses was in most cases to the hind legs, indicating that they were running away from the engine. To look no further than this evidence, it appears to me that the conclusion that the engine-driver was guilty of negligence is not merely a fair conclusion, but indeed the only reasonable conclusion that could be drawn. One can hardly see how, without wilful or gross negligence, a train could succeed in killing the number of horses that were killed in this instance; but, in addition to that, the fact that the horses ran down the track for a distance of over a quarter of a mile ahead of the train and apparently to get away from it and that the engine-driver did not see them, if his evidence is to be believed, indicates with a reasonable degree of certainty that he was not keeping any look-out, and when in his evidence he admitted that he was not looking out continuously, it appears to me that the trial Judge was justified in concluding, as he no doubt did, that he was practically, if not absolutely, keeping no look-out at all, if he believed his evidence, and if it was not to be believed that he wilfully went ahead, though seeing the horses, in the belief that they would get out of the way and so save him the necessity of stopping or slacking up. It appears to me also that the evidence of Bye, the section foreman, who says that the engine-driver stated to him that "they ought to be prosecuted for letting the horses run on the track," indicates a consciousness on his part that he was to blame for the accident and wished to free himself by casting it on to the owners.

I am of opinion, therefore, that the evidence clearly warrants the findings of the trial Judge and that therefore they should not be disturbed.

Digitized by Google

It was contended by counsel for defendants that, the animals in question being trespassers, there was no duty on the part of defendants to look out for them. Even if such a rule of law were established in England or in the eastern provinces, where the railways travel through a country which is fenced, and where they have a right to expect that by reason thereof their track will be free from trespassers, I apprehend that such a rule might not be applicable to the conditions existing here, where the railway passes through a country where large numbers of cattle and horses have the right to and do roam at large, and the railway company makes no provision by fencing to keep them off their track.

I may say, however, that I find no authority for the proposition thus baldly laid down. On the contrary, it appears to be established by many cases of which I need cite only McMillan v. Manitoba and North-Western R. W. Co., 4 Man. L. R. 220; Bender v. Canada Southern R. W. Co., 37 U. C. R. 26; and Campbell v. Great Western R. W. Co., 15 U. C. R. 498; that, notwithstanding that plaintiffs may be negligent or may be wrong-doers, yet defendants are bound to use reasonable care, and if they fail to do so and damage results they are liable.

As regards the question of damages, I am of opinion that the trial Judge adopted the proper basis of assessing them by reference to the value and not the cost of the horses, and that the defendants have no cause of complaint by reason of the amount.

For these reasons I am of opinion that the appeal should be dismissed with costs.

---

## NORTH-WEST TERRITORIES.

APRIL 19TH, 1905.

THE SUPREME COURT IN BANCO.

### PLISSON v. DIEMERT.

*Receiver—Management of Hotel—Liability for Loss—Wilful Default.*

Appeals by both plaintiff and defendant in a partnership action from an order of NEWLANDS, J., upon the passing

Digitized by Google

of the accounts of Mr. Duncan, the sheriff of the judicial district of Western Assiniboia, as receiver and manager of the hotel business which had been carried on by plaintiff and defendant in partnership, finding that the receiver was not responsible for and should not be charged with a deficit of $1,367.16 incurred in carrying on the business. NEWLANDS, J., held that the deficit was not caused by the wilful default of the receiver.

The appeal was heard by SIFTON, C.J., WETMORE, PRENDERGAST, and HARVEY, JJ.

A. Ross, Regina, for plaintiff.

N. Mackenzie, Regina, for defendant.

J. Balfour, Regina, for receiver.

WETMORE, J., gave reasons in writing, in which PRENDERGAST, J., concurred, for holding that the receiver was liable.

HARVEY, J., gave reasons in writing, in which SIFTON, C.J., concurred, for holding that the receiver was not liable.

THE COURT being evenly divided, the appeal was dismissed.

---

## NORTH-WEST TERRITORIES.

### (WESTERN ASSINIBOIA.)

NEWLANDS, J. MAY 8TH, 1905.

CHAMBERS.

### HARVEY v. SILZER.

*Husband and Wife—Land Acquired by Wife—Separate Property—Seizure of Crops by Execution Creditor of Husband —Work Done by Husband on Land.*

Summary trial of interpleader issue.

A. D. Dickson, Qu'Appelle Station, for execution creditor.

W. M. Martin, Regina, for claimant.

Digitized by Google

NEWLANDS, J.:—Under an execution issued in the above suit against defendant, the sheriff seized 550 bushels of wheat. The claimant, the wife of the defendant, claims this wheat as her property raised on her land. The evidence shews that the defendant and claimant were married in Austria, and about 7 years ago came to this country. Before leaving Austria the mother of the claimant gave her $200 to buy land for herself in this country. This money was given to defendant to pay the passage money of his family to Canada, and the balance of it was used in keeping his family until he took up a homestead here. All this was done under an oral agreement to return this $200 to the claimant by investing the same in land for her here. This the defendant did as soon as he had the money, and the north-east quarter of section 26, township 18, range 17 west of the 2nd meridian, was bought for her in her name and $200 paid on it and a mortgage given by her on this land for the balance. Since then the claimant has resided on this land. The defendant also resided on it a part of the time and the remainder on his own homestead. The implements and horses used on both farms were bought by the husband, but were to be paid for by the husband and wife, and have been partly paid for by the claimant from the proceeds of her farm and other moneys earned by her. The seed grain was obtained from her husband. He worked on her farm part of the time, but did more work on his own farm than hers. There is no evidence that she paid him anything for his services, and the rest of the work was done by her brother-in-law and her son, and she paid her brother-in-law whatever he received for his services. She also paid for the threshing. The farm was looked upon by both parties as hers, and she directed the work on it. She did not always receive the money realized from the sale of her grain, as some of it went to pay his debts, but always with her consent.

From the above evidence I think the land on which the grain in question was grown belonged to the claimant.

In the North-West Territories a married woman as to both real and personal property has all the rights of a feme sole. Section 11 of the Land Titles Act, 1894, provides: "A married woman shall in respect to land acquired by her on or after the 1st day of January, 1887, have all the rights and be subject to all the liabilities of a feme sole, and may

Digitized by Google

in all respects deal with land as if she were unmarried." Chapter 47 of the Consolidated Ordinances, 1898, which was taken from Ordinance No. 20 of 1890, provides: "A married woman shall in respect to personal property be under no disabilities whatsoever heretofore existing by reason of her coverture or otherwise, but shall in respect of the same have all the rights and be subject to all the liabilities of a feme sole." It was decided by the Supreme Court of Canada in Conger v. Kennedy, 26 S. C. R. 397, that personal property in this Ordinance means all her personal property. The Chief Justice in giving the judgment of the Court said: "Then the words 'her personal property,' unconfined by any context, must be interpreted as having reference to all the personal property belonging to a married woman, married subsequently to the Act, as well as to all the personal property acquired since the Act. This is the plain prima facie meaning of the words in question, taken in their ordinary sense, from which we have no authority to depart."

These two statutes make the right of Mrs. Silzer in the land and the crop raised on it the same as if she were a feme sole. Now, if she were not the wife of the defendant, no question could arise as to who owned this crop. The fact that some one lent her seed grain and did some work for her would not give that person any right to the ownership of the crop raised, unless the facts of the case shewed that such person was the tenant of the land, and I think it is only in that case that the husband could claim the ownership of the crop raised on his wife's farm. It was upon that construction of the facts that the Court of Queen's Bench in Ontario in Lett v. Commercial Bank, 24 U. C. R. 552, decided that the crop raised on the wife's land was the property of the husband, and that case was distinguished on that ground by the same Court in Plows v. Maughan, 42 U. C. R. 129, and Ingram v. Taylor, 46 U. C. R. 52 and 7 A. R. 216, where it was held that the facts did not shew that the husband was the tenant of the land and working the farm as the head of the family.

In this case I do not think that the husband was working this land as the tenant of his wife or the head of his family, but that whatever work he did was under her direction, that the farm was worked by her for the maintenance of herself and family, on account of the drinking habits of her husband, who evidently did not provide sufficiently for the family.

Digitized by Google

I therefore hold that the grain seized was the property of the claimant and is not seizable under the execution against the defendant.

---

## NORTH-WEST TERRITORIES.

### (WESTERN ASSINIBOIA.)

NEWLANDS, J. MAY 13TH, 1905.

CHAMBERS.

## DUNDAS v. OSMONT.

*Landlord and Tenant — Overholding Tenant — Claim by Landlord for Double the Yearly Value of Demised Premises—Assertion by Way of Counterclaim in Tenant's Action—Lease for One Year Terminable on one Month's Notice.*

In this action defendant counterclaimed for double the yearly value of premises leased, for overholding after notice in writing terminating the lease.

Plaintiff in his reply stated that he would object, first, that defendant was not in this action entitled in law to set up a claim for double yearly value, but must sue for the same by substantive action; and second, that the tenancy in question did not come within the provisions of 4 Geo. II. ch. 28, sec. 1, inasmuch as plaintiff was not tenant to defendant for a term of years, life or lives.

By consent these objections were set down for hearing under sec. 149 of the Judicature Ordinance.

T. C. Johnstone, Regina, for plaintiff.

Ford Jones, Regina, for defendant.

NEWLANDS, J.:—As to the first objection, sec. 110 of the Judicature Ordinance provides that "a defendant in an action may set off or set up by way of counterclaim against the claims of the plaintiff any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross-action so as to enable the Judge to pronounce a final judg-

Digitized by Google

ment in the same action both on the original and cross-claim." Under this section the defendant can set up by way of counterclaim any claim that could be the subject of an action, and it is only where a special remedy is provided by a statute for a wrong which is not by way of action that it cannot be set up, and where the particular remedy must be followed.

For instance, under the Land Clauses Act, 8 & 9 Vict. ch. 18, a party whose land is taken by a railway company may obtain compensation in one of three ways only; if the amount is under $50, by applying to two justices of the peace; if over that amount, then either by arbitration or by a jury summoned by the sheriff, and he cannot either sue for compensation or set up the same as a counterclaim: Manchester, etc., R. W. Co v. Anderson, [1898] 2 Ch. 394.

Under 4 Geo. II. ch. 28, the double yearly value is to be recovered by an action of debt, which was the old form of personal action, to recover a sum certain or capable of being reduced to certainty by calculation payable in respect of a direct and immediate liability of a debtor to a creditor: English Encyc. of Law, vol. 4, p. 153. As this form of action is now practically abolished, the proceeding under this statute is by the ordinary writ of summons. It cannot, therefore, be said that there is any special mode of procedure provided, and, as it is recovered in an ordinary action, I think it is properly a matter of counterclaim.

As to the second objection, 4 Geo. II. ch. 2 provides that in case any tenant for life, lives or years, wilfully holds over, he shall pay double the yearly value of the lands for so long as the same is detained.

In this case the lease was for one year, but it was provided that it might be terminated by either party giving to the other one a full month's notice in writing of his intention to terminate the same, and under this provision this lease was terminated before the end of the year.

It is contended by plaintiff that, as this lease could be terminated in less than a year, the lessee cannot be considered a tenant for years.

In delivering the judgment of the Court in The King v. Herstmonceaux, 7 B. & C. 551, Bayley, J., in discussing this question says: "In then a taking at 20 guineas a year, the rent to be paid weekly, and either party to be at liberty

Digitized by Google

to give three months' notice from any quarter day, and at the expiration thereof to determine the tenancy, to be considered a bona fide renting of a tenement for the term of one whole year. A taking at an annual rent, though the rent is to be paid weekly, is prima facie a yearly tenancy; if there had been no proviso about quitting at three months' notice there could have been no doubt on the subject, as it would then have been an ordinary yearly tenancy with the rent to be paid weekly instead of half-yearly. What then is the legal effect of a tenancy for a year with a proviso for determining it in the middle of the year? Such a proviso does not prevent it from being a yearly tenancy. When the party is in, he is in for the whole estate for a year, liable to a defeasance on a particular event. In all cases of defeasible estate, when the party enters, he is in of the whole estate, though an event may afterwards occur which would prevent the estate from continuing during the whole period of time contemplated in the original grant of it.

As where there is a lease for 21 years, determinable at the end of 7 or 14 years, the party when he enters is in for a term of 21 years, but a defeasible term, and which may be determined by matter ex post facto.

In this case the lease was for the term of one year, for a rent of $1,500, payable monthly. If therefore the tenant on entering took for the whole term, the provisions of the statute would, I think, apply, as a term for one year has been held to come under it, as well as one for a number of years.

In Cobb v. Stokes, 8 East 358, the Court held a tenant for one year and no longer, liable for double the yearly rent for overholding after notice, and this is practically laid down by Lord Ellenborough in his judgment in Lloyd v. Rosbee, 2 Camp. 453, where he says: "I am strongly inclined to think that this case does not come within the statute which speaks of tenants for life, lives, or years. I am aware that a tenant for half a year or a smaller portion of a year may for some purposes be considered a tenant for years. But this is a penal statute and is to be construed strictly. A tenant from week to week I therefore cannot include in the description of tenant for life, lives, or years; and I do not remember anv instance of a tenant for a less time than a year being held within this Act of Parliament."

I therefore think the counterclaim set up by defendant in this case is a good one.

Digitized by Google

## NORTH-WEST TERRITORIES.

### (WESTERN ASSINIBOIA.)

NEWLANDS, J. MAY 13TH, 1905.

CHAMBERS.

### BOCZ v. SPILLER.

*Execution—Homestead Exemption—Mortgage—Sale—Lien on Proceeds—Land Titles Act—Incumbrances.*

The defendant, Edward Spiller, took up a quarter section of land as a homestead under the Dominion Lands Act, and obtained a patent therefor, after performance of the necessary homestead duties.

At the time of the issue of the certificate of title there were 4 executions in the hands of the registrar, which had been sent by the sheriff under the provisions of the Land Titles Act, 1894, and they were indorsed on his certificate of title. Subsequently the defendant mortgaged this land to the Imperial Bank of Canada for $428, which mortgage was afterwards transferred to the plaintiff, and on the same day gave a second mortgage to the International Harvester Company of America. These mortgages were registered subsequently to the 4 executions.

The plaintiff applied, upon an originating summons, for an order for the sale of the land under the first mentioned mortgage, and that the mortgage be declared a first charge, and the execution creditors ordered to withdraw their executions as to this land.

The defendant swore that this quarter section was his homestead; that he did not own any other land, and was actually residing thereon; and he contended that the balance of the purchase money arising from the sale, after payment of the mortgages and costs, should be paid to him.

A. L. Gordon, Regina, for plaintiff.

F. L. Embury, Regina, for defendant.

W. M. Martin, Regina, for certain execution creditors.

N. Mackenzie, Regina, for second mortgagee.

A. Ross, for other execution creditors.

Digitized by Google

NEWLANDS, J.:—Upon the argument several cases decided by the Court of Queen's Bench in Manitoba were cited, but I find they are of very little assistance to me in coming to a conclusion in this case, because the statute of that province relating to exemptions is different from ours. There the judgment is a lien upon the exempted land, although no proceedings can be taken to enforce it so long as the property retains the character which entitles it to such an exemption. In the Territories a judgment is not a lien upon land; whatsoever effect it obtains is through the filing of the execution in the Land Titles Office.

Section 2 of ch. 27 of C. O. 1898 provides: "The following real and personal property of an execution debtor and his family is hereby declared free from seizure by virtue of all writs of execution: . . . (9). The homestead, provided the same be not more than 160 acres; in case it be more, the surplus may be sold subject to any lien or incumbrance thereon." Section 92 of the Land Titles Act, 1894, provides that no land shall be bound by any writ of execution until the receipt of a copy thereof by the registrar, "but from and after receipt by him of such copy, no certificate of title shall be granted, and no transfer, mortgage, incumbrance, lease, or other instrument executed by the execution debtor of such land shall be effectual except subject to the rights of the execution creditor under the writ while the same is legally in force."

As the execution creditors could not seize this land under their writs of execution, I do not think they have any rights thereunder with which this land could be charged under the Land Titles Act, and therefore, although registered against it, these executions are not incumbrances to which it is subject, and on the sale of the same under the mortgage the land would vest in the purchaser free from incumbrances.

The execution creditors contend that the sale under the mortgage is a voluntary one, and that on the homestead being converted into money it will lose its character as a homestead, and the proceeds will not then be exempt, and that they are entitled to receive the amounts due them therefrom.

Although a debtor has the right to do as he likes with his property which is exempt from seizure: Temperance Insurance Co. v. Combe, 28 C. L. J. 88; Re Beatty and Finlayson, 27 O. R. 642; Freeman on Execution, p. 1165; if he voluntarily converts it into other property which is not exempt from seizure that property would not be entitled to

Digitized by Google

the protection given by the Exemption Ordinance: Thompson on Homesteads and Exemptions, p. 746; Massey-Harris Co. v. Schram, 5 Terr. L. R. 388. In that case Mr. Justice Scott said: "The provision exempts the homestead only so long as it remains a homestead, and where the debtor has voluntarily sold and disposed of it, the language of the provision is not wide enough to extend the exemption to the proceeds of such sale."

The debtor having the right to mortgage his property, he to that extent waives his right of exemption, but it is not an unconditional waiver—it only entitles the mortgagee to subject the property to the satisfaction of his claim in like manner and to the same effect as if it were not exempt, but with respect to other creditors the property is exempt to the same extent as before the mortgage was given: Freeman on Execution, p. 1167.

If the sale is not a voluntary one, the proceeds would, I think, be exempt from seizure, because a debtor who by a forced sale of his property loses his homestead, should not on that account be deprived of the right of acquiring another one from the surplus proceeds of the sale, if any: In re Demaurez, 5 Terr. L. R. 84.

If his house is burned down and he has it insured, insurance money is exempt from seizure and he is entitled to receive the same to restore his home: Osler v. Winter, 19 A. R. 94.

The sale in this case was not, in my opinion, a voluntary one, but a forced sale. It is true it is under a mortgage given by him, but, as I have said, he had a right to mortgage it, and it is probable that at the time he gave the mortgage he expected to be able to pay it, and that it would not have to be sold. It is no more a voluntary sale than in In re Demaurez, where the land including the exemption was sold under order of the Court, the debtor having made a general assignment for the benefit of creditors. No sale which is ordered by the Court can be considered voluntary, as the debtor has no choice in the matter; he must either pay the amount due or the land will be sold.

I am therefore of the opinion that the executions indorsed on the certificate of title of the defendant's homestead do not incumber it, and that the land will vest in the purchaser free from incumbrances, and after payment of the amounts due the mortgagee, the balance must be paid to the defendant, Spiller.

Digitized by Google

## NORTH-WEST TERRITORIES.

### (EASTERN ASSINIBOIA.)

WETMORE, J. MAY 22ND, 1905.

CHAMBERS.

## JOBIN-MARRIN CO. v. BETTS.

*Execution—Fi. Fa.—Seizure of Book Debts—Attachment of Debts.*

A garnishing matter.

G. Elliott, Yorkton, for plaintiffs.

James F. MacLean, Yorkton, for all the judgment creditors.

WETMORE, J.:—Plaintiffs issued a garnishee summons against the garnishees and caused them to be served therewith, and thereby the debts due from them to the defendant became attached on behalf of the plaintiffs, as contended by the plaintiffs. The defendant Betts filed a suggestion objecting to the payment by the garnishees to the plaintiffs of the amounts owing by such garnishees, on the ground that judgments were entered against the defendant by the Bank of British North America, the G. R. McCracken Co., Arthur Congdon, John A. Macdonald & Co., Kyle, Cheeseborough, & Co., S. F. McKinnon & Co., and Donald Fraser & Co.; and that executions were issued upon such judgments before the issue of the garnishee summons, and placed in the hands of the deputy sheriff at Yorkton, and were unsatisfied at the time of the issue and service of the garnishee summons; and that the deputy sheriff, after the executions were so issued and placed in his hands, seized the book debts and promissory notes belonging to the above named defendant by virtue of the executions. A suggestion was also filed on behalf of the Bank of British North America and the G. R. McCracken Co., setting forth that judgments were obtained by them and executions issued and placed in the deputy sheriff's hands, as before stated.

Under Rule 392 of the Judicature Ordinance I made an order that the parties who were so alleged to be interested in

Digitized by Google

these judgments and executions should appear and state the nature and particulars of their claims. At the return of the summons it was conceded that no promissory notes of the defendant had been seized, and the only question raised was whether unsecured book debts or accounts due from the garnishees to the defendant were bound by the executions and liable to seizure thereunder.

It is quite clear to me that at common law book debts would not be bound by fi. fa. executions or liable to seizure thereunder, and the only question to decide is whether the common law has been changed by the Ordinance. It is contended that, inasmuch as Rule 356 of the Ordinance provides that writs of execution against goods and chattels shall bind "all the goods and chattels" of the judgment debtor, book debts are bound. If that Rule stood alone, there might be something in the contention on behalf of the judgment creditors, but Rule 359 sets out what character of choses in action may be seized under execution, and they consist of "any money or bank notes, any cheques, bills of exchange, promissory notes, bonds, mortgages, specialties, or other securities for money belonging to the execution debtor." Unless book debts come under some one of the subjects so specified, they are not liable to seizure. It seems to me that was the intention of the legislature, because, if Rule 356 applies to all goods and chattels of the judgment debtor, including choses in action, there was no necessity for enacting Rule 359. I also draw attention to the judgment of the Supreme Court of British Columbia in Hudson's Bay Co. v. Hazlett, 4 B. C. R. 450, which proceeds substantially upon the same lines as I do in this judgment.

There will be, therefore, a declaration that the book debts in question were not bound by the executions nor liable to seizure thereunder, and the deputy sheriff will withdraw from any such seizure. At the time of the appointment by my order for the hearing of this matter all the persons who it was suggested had judgments and executions, except Donald Fraser & Co., appeared and contended that these executions had precedence over the attachment under the garnishee summons. All these parties (except Donald Fraser & Co.) and the defendant Betts will pay the plaintiffs' costs of and incidental to the suggestions filed, and of and incidental to my order before mentioned, and the hearing thereunder.

Digitized by Google

## NORTH-WEST TERRITORIES.

### (SOUTHERN ALBERTA.)

HARVEY, J. MAY 22ND, 1905.

TRIAL.

## CHAN DY CHEA v. ALBERTA RAILWAY AND IRRIGATION CO.

*Railway—Passenger—Destruction of Luggage by Fire—Liability—Contract or Tort—Contract Made by Third Person for Carriage of 54 Chinamen—Joint Contract—Action by One—Damages—Personal Effects and Household Goods.*

Action to recover the value of plaintiff's luggage destroyed by fire in a car of defendants attached to a train in which plaintiff was a passenger.

L. M. Johnstone, Lethbridge, for plaintiff.

James Muir, K.C., and C. F. P. Conybeare, K.C., for defendants.

HARVEY, J.:—Defendants are common carriers carrying on business as a railway company in Southern Alberta, and having their head office in Lethbridge. On 15th April, 1904, plaintiff, who is a Chinaman, together with 53 of his fellow countrymen, arrived at Lethbridge after the regular train to Raymond over defendants' line of railway had departed, there being no other regular train scheduled to leave for Raymond for three days. There apparently was only one of the 54 Chinamen, named Shun Moon, who could speak English, and he had two or three interviews with defendants' station agent and train despatcher, as a result of which a train was arranged for, to leave for Raymond that afternoon. This train consisted of an engine, two cars of coal which defendants wished to send to Raymond, a freight box car in which the luggage of the 54 Chinamen was loaded, two passenger coaches, and in the rear a conductor's car or caboose. Two or three miles from the station the car containing the luggage was discovered to be on fire. The train was stopped and efforts made to extinguish the fire, but without success, and the car and its contents, including plaintiff's luggage, were

Digitized by Google

entirely consumed. This action is brought to recover the value of his luggage.

Before dealing with the facts in dispute, it may be worth while to consider the law with some of the authorities bearing on the subject.

Carriers of passengers appear to be liable only for injury caused by negligence while carriers of goods, including the personal luggage of passengers, but are liable as insurers for all injuries not caused by the act of God or the King's enemies, unless the injury is caused by some act of the party himself (Great Western R. W. Co. v. Talley, 40 L. J. C. P. 9), or is due to some defect or inherent vice in the goods carried (Lister v. Lancashire and Yorkshire R. W. Co., 72 L. J. K. B. 385.)

It is quite clear also that as regards personal luggage the liability is the same whether the luggage is carried in a baggage car or elsewhere, so long as the loss or injury is not occasioned by any act of interference with the control of the luggage on the part of the passenger. For this proposition I refer to the Ontario case, Gamble v. Great Western R. W. Co., 24 U. C. R. 407, and a case decided by the House of Lords in 1888, Great Western R. W. Co. v. Bunch, 57 L. J. Q. B. 367. In Forward v. Pittard, 1 T. R. 27, reported in Campbell's Ruling Cases, vol. 1, p. 216, in which the carrier was held liable for loss occasioned by the burning of the goods being carried, the fire being communicated from an outside source and not caused by lightning, Lord Mansfield said: "It appears from all the cases for one hundred years back that there are events for which the carrier is liable independent of his contract. By the nature of his contract he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law: a carrier is in the nature of an insurer. It is laid down that he is liable for every accident except by the act of God or the King's enemies."

In Marshall v. York, Newcastle, and Berwick R. W. Co., 21 L. J. C. P. 34, the plaintiff was the servant of Lord Adolphus Vane, who had purchased tickets for both. The plaintiff's portmanteau, which had been put on the train, was lost, but, as far as the report indicates, there was no evidence of negligence. The action was for the value of the portmanteau. It was contended that the contract being with

Digitized by Google

the master and not with the servant, the servant could not succeed. This contention was, however, overruled and judgment given for the plaintiff.

In Tattan v. Great Western R. W. Co., 29 L. J. Q.B. 184, which was an action to recover the value of goods shipped but not delivered, the question was whether the action was one "of contract" or one "of tort." All the Judges, following the Marshall case, were of opinion that it was an action of tort. Cockburn, C.J., says (p. 186): "Whatever may be the distinction between an obligation arising out of a contract and a duty imposed by the common law on parties entering into a contract, it has been established that the present case is one of duty imposed on the contract being entered into, independently altogether of the contract of the parties."

Austin v. Great Western R. W. Co., 36 L. J. Q. B. 201, was an action brought by an infant for damages for injury through defendants' negligence in carrying it. No fare was paid for the carriage of the child (who was accompanied by its mother, who had purchased a ticket), though it was over the age under which children were carried free. The Court unanimously decided that the company were liable. Shee, J., says: "I think that there was an entire contract to carry both the mother and her child, and it would have made no difference if she had taken two tickets instead of one. The contract was made by her on behalf of herself and her child, and the company, who have had the benefit of it by receiving the fare, cannot escape from the liability which attaches to them as carriers of passengers."

In the same year (1867) the case of Martin v. Great Indian Peninsula R. W. Co., 37 L. J. Ex. 27, was decided by the Court of Exchequer. This was an action brought by an officer in the government service, who was a passenger on defendants' railway in India, for personal luggage destroyed by fire. The defence was that the plaintiff and his luggage were being carried under a contract with the government, one of the terms of which was that "the baggage shall remain in charge of a guard provided by the troops, the company accepting no responsibility." It was held that the plaintiff had no right of action merely for non-delivery, as that was simply a breach of the contract, which was not made with the plaintiff, but that for negligence the defendants would be liable to the plaintiff, the non-liability clause being merely



Digitized by Google

"a limitation of the responsibility for a loss arising from due care not being taken of the luggage by the guard."

On the first branch, this case seems to be slightly at variance with some of the preceding cases, but, in view of the fact that in this case there was an express contract and that none of the preceding cases are mentioned in any of the judgments, but, on the contrary, the defendants' counsel in his argument contended that the Marshall case "is not an authority in the plaintiff's favour here, for it was decided upon the custom of the realm, which does not extend to India," it scarcely seems proper so to consider it.

The defendants' counsel cited also Alton v. Midland R. W. Co., 34 L. J. C. P. 292, in which it was held that the employer could not maintain an action against the defendants because of injuries done to his servant while travelling on his business, and Becher v. Great Eastern R. W. Co., 39 L. J. Q. B. 122, in which it was held that the employer could not maintain an action for the value of his personal luggage which was taken by the servant on his own ticket, but, as pointed out by Pollock in his work on Torts, 7th ed., p. 533, both of these cases have been virtually overruled, and they need not, therefore, be considered.

In Foulkes v. Metropolitan District R. W. Co., 49 L. J. Q. B. 361, the Court of Appeal held that the defendants were liable to the plaintiff for injuries received by him on their train by their negligence, though the ticket was purchased from another company, the liability being independent of any contract. Thesiger, L.J., cites as authorities the Marshall and Austin cases, and says (p. 369): "He (defendants' counsel) attempts to draw a line in a case like the present between the commission of an act which is in itself wrongful and the omission of some act to which the company would admittedly be bound if the passengers were carried by them under a contract. It is, however, very difficult to see how such a line can be reasonably drawn." And again: "I think that the true principle in such a case as the present is that the carrying company, so far as concerns its own lines and its own acts or omissions, is under the same obligations in reference to the security of the passenger as it would have been if it had directly contracted with him."

In Meux v. Great Eastern R. W. Co., 64 L. J. Q. B. 657, it was held that the plaintiff could recover for the loss of her goods, consisting of a servant's livery, which were destroyed by the negligence of the defendants while being car-

Digitized by Google

ried as personal luggage of the servant, notwithstanding that there was no contract between the plaintiff and defendants. Were it not for some of the reasons given in the last mentioned case, the conclusions I should draw from all the foregoing cases would be that the relation of carrier and carried having been established, the obligation on the part of the carrier arises out of that relation irrespective of any contract, and is the same whether the person who or whose goods are being carried is or is not the person who entered into the contract out of which the relation arose. The Judges in this case, as well as Lord Bramwell in the Foulkes case, though not necessary for the determination of the case, express the view that while the carrier is liable to the owner for misfeasance regardless of contract, yet for nonfeasance, e.g., non-delivery, he would be liable only to the person with whom he contracted. This view appears to me scarcely consistent with the decisions in Forward v. Pittard and the Marshall case, but on the facts of the present case I do not think that it is necessary to choose between the two.

With this consideration of the law, I will now deal with the facts which, in my opinion, are material for the determination of the case as I find them from the evidence.

The plaintiff and others were engaged by one Sam Kee, a merchant in Vancouver, of whom the witness Shun Moon was a partner, to come from Vancouver to Raymond to grow beets for the sugar beet factory there, at the price which was paid by the factory for such service. Sam Kee and his partner were to advance the necessary money and supplies to convey the plaintiff to Raymond and keep him there, and the money for the raising of the beets earned by the plaintiff was to be and was paid to an employee of Sam Kee's at Raymond, who deducted the moneys advanced, including the railway fare from Vancouver to Raymond and the value of the supplies, and the balance was to be and was paid over to plaintiff. The day before plaintiff and his fellow passengers arrived in Lethbridge, Mr. Naismith, the defendants' general manager, caused an order to be issued and delivered to the ticket agent in the following words:

"April 14, 1904.

"To Mr. Hardy, Agent.

"On surrender of this order on or before April 25th, 1904, please issue to Chinamen 50 (changed to 54) tickets from Lethbridge to Raymond and collect therefor at the rate of 70 cents per ticket, a total of dollars."

Digitized by Google

Mr. Naismith explained that this order was issued not at the instance or with the knowledge of the plaintiff or any one on his behalf, but because he had learned that the Chinamen were coming and he wished to give them a reduced rate to Raymond. When Shun Moon applied to Mr. Hardy, defendants' agent, for tickets, he received a single ticket marked "Good for one continuous passage from Lethbridge to Raymond," with the figures and words "54 Chinamen" written across it in two places. The regular train for Raymond having departed when the plaintiff and his fellow countrymen arrived, Shun Moon, at the request of the plaintiff, went to the defendants' officers and expressed the desire of the Chinamen to go out to Raymond as soon as possible, and in consequence of this Mr. Kevin, the company's train dispatcher, decided to send out a train that afternoon to Raymond, which was 26 miles away, as soon as the train from Cardston and Raymond came in, with the same train crew as that train carried, and he informed Shun Moon that the train would go, and asked him if he would have the baggage loaded by some of the Chinamen. It is explained by Mr. Kevin that the reason he asked for this to be done was because the defendants had no men at the station to do it, and unless the Chinamen did it it would be necessary to call in some men engaged at other work or wait till the regular train came in and thus delay the getting away of the special train, which he wished to avoid. Shun Moon expressed his willingness, and Mr. Kevin had a freight box car placed on the track when the luggage was loaded by the Chinamen under the observation and supervision of Mr. Hardy, the defendants' station and ticket agent, who, after the luggage was all loaded, closed and fastened the door of the car. There was some conflicting evidence regarding a seal being put on the door, but it does not appear to me to be of any consequence whether there was or not. Nothing further appears to have been done with the car or its contents until they were discovered to be on fire. It was contended by defendants' counsel that the contract for carriage was with Shun Moon, who was the employer of the plaintiff and the other Chinamen. Even if this were so, it would appear to be on all fours with the Marshall case, but I am of opinion that it is not so. Though the price of the ticket was paid by Shun Moon in the first place, it was so paid on behalf of the plaintiff and the others, who subsequently repaid him, and they were not in reality his employees at all.

Digitized by Google

Then it was urged that if the contract were not with Shun Moon alone, it was a joint contract with all the 54 Chinamen, and the plaintiff cannot sue alone. I cannot arrive at this conclusion. The fact that only one ticket was issued seems to me to have no significance whatever as regards either of these contentions. The direction to the agent was to issue 54 tickets, not one, but evidently to save himself labour, since they were all going by one train, he issued only one, thinking one ticket would answer the purpose as well. The contract, in my view, was, in consideration of 70 cents paid by each Chinaman, to carry such Chinaman and his luggage, safely. To hold that it was simply a joint contract would lead to the singular conclusion that if one of the Chinamen alone had been injured or his luggage damaged he would have no right alone under the contract against the company.

One of the grounds of defence raised by the pleadings was that the plaintiff undertook to relieve defendants of responsibility. There was no evidence of any express undertaking of this sort, and I find that there was no such undertaking. It was also urged that the luggage being loaded in a box car without being checked, or without a servant of the defendants in charge of it, was such a circumstance as to relive defendants from liability in respect of it as personal luggage. I confess myself unable to see how this can help defendants. It is perfectly clear on the evidence that defendants proposed to carry this luggage to Raymond for the consideration paid for the fares, and whether they proposed to deal with it as ordinary freight or as personal luggage, appears to me to be of no consequence whatever, the liability for either being exactly the same. It was put into a car specially provided by defendants for the purpose, and I think they must accept the responsibility for its safe keeping and carriage. I may say, however, that I consider it was received as personal luggage. There is no evidence whatever that plaintiff or any one of the Chinamen in any way interfered with the luggage after it was loaded, but there is evidence that some partly burned matches were found in one of the burning bundles of luggage, and from this it was urged that there was inherent vice which caused the destruction of the luggage. I have not come to a conclusion as to the cause of the fire or whether it was due to defendants' negligence, because it has not appeared necessary for me to do so in arriving at my decision, but I do not hesitate to

Digitized by Google

say that I do not consider that the evidence warrants the conclusion that it was caused by the presence of matches without the intervention of some outside agency. The matches which were discovered clearly could not have been the cause of the fire, for they were found only partly consumed in a bundle in a part of the car where the fire was the least fierce. Beyond this fact plaintiff has testified that there were no matches whatever in his luggage, so that, even if the fire had been started from matches in some luggage, it could not have been in that of plaintiff.

On the authorities cited and on the facts as I find them, I come to the conclusion that defendants are liable to plaintiff for the loss sustained in the destruction of his personal luggage.

Some of the articles for the loss of which plaintiff claims compensation consisted of blankets, pillows, and other bedding material, which plaintiff intended for his personal use while in Raymond and of somewhat inconsiderable value. In Macrow v. Great Western R. W. Co., 40 L. J. Q. B. 300, it was held that similar articles to these taken by a passenger intending to use them for household purposes were not personal luggage. The true rule is there stated by Cockburn, C.J., at p. 304, to be "that whatever the passenger takes with him for his personal use or convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purposes of the journey, must be considered as personal luggage." Under this rule, the same class of goods as were then declared to be not personal luggage would, in other circumstances and in reasonable quantities, be deemed personal luggage. It is perhaps a little hard to decide on which side of the line such cases as the present should fall. I am rather disposed to the view that, having regard to the circumstances of the present case, these goods should be considered as personal luggage, but I prefer to base my conclusion on another ground, viz., that defendants had knowledge of what plaintiff was taking as luggage and made no objection. In Great Northern R. W. Co. v. Shepherd, 21 L. J. Ex. 286, cited in the last case, Lord Wensleydale says: "If the plaintiff had carried these articles exposed . . . so that the company might have known what they were, and they had chosen to treat them as personal luggage and carry them without demanding any extra remuneration, they would have been responsible for the loss." In the present case, the

Digitized by Google

defendants' station agent assisted in taking the C. P. R. checks off all the luggage of all the Chinamen and watched it all being put into the car. The luggage of the plaintiff now under consideration was tied up in one of the blankets without any other covering, and the evidence shews that there were other bundles of the same sort in different coloured blankets. In these circumstances I think defendants cannot now be allowed to deny liability.

The only remaining question to consider is the value of the luggage destroyed. The evidence on this point is not by any means complete, but it appears that the articles intended and required for use at Raymond had been just purchased and were new, and that the others had been in use for some time. As nearly as I can determine, the new articles at the purchase prices sworn to, cost $34.05, and the remaining articles cost $50.40. It appears to me that a deduction of one-third from the cost of these last mentioned articles would probably give a fair estimate of their value at the time. That will fix the value of them at $33.60 and the value of all at $67.65. Judgment will therefore be for the plaintiff for $67.65 with costs, which by reason of the important questions of law arising and the amount indirectly involved, I direct to be taxed on the higher scale.

---

## NORTH-WEST TERRITORIES.

### (WESTERN ASSINIBOIA.)

NEWLANDS, J. MAY 25TH, 1905.

CHAMBERS.

### KERR v. BROWN.

*Arbitration and Award—Agreement to Refer—Stay of Action —Inconsistent Provisions of Agreement—Parties not ad Idem.*

Application by defendant to stay the proceedings in this action, under sec. 5 of the Arbitration Ordinançe, on the ground that there was an agreement to submit the matters in dispute to arbitration.

N. Mackenzie, Regina, for defendant.

F. Jones, Regina, for plaintiff.

Digitized by Google

NEWLANDS, J.:—The evidence shews that the parties had an agreement drawn up under which plaintiff was to do the carpentering work and supply certain materials in the construction of an hotel for defendant for a price therein agreed.

Amongst other things, the agreement, as drawn up, contained the two following provisions: "And it is hereby agreed that the said William Crossley shall be appointed to superintend the work to be done and material supplied by the said William K. Kerr in accordance with the terms of this agreement, and that in case the said William Crossley shall disapprove of the work done by the said William K. Kerr, or the materials used by him, or the manner in which such work is done, it shall be lawful for the said John Brown to discharge the said William K. Kerr from the further performance of the said work, and employ some other person to complete the same; and that in such case the money which the said John Brown shall pay to the said other person shall be deducted from the sum which would otherwise be payable to the said William K. Kerr under this agreement." 2. "And it is hereby agreed that in case any dispute shall arise in regard to the said work or any material used therein or the manner in which such work is done, the same shall be referred to two arbitrators, . . . and their award shall be final and conclusive and binding upon the parties to this agreement."

By the first clause, if the work done and materials supplied are disapproved of by William Crossley, defendant is given the right to dismiss plaintiff and have the work done by some other person and charge the cost thereof against the contract price; and by the second clause, if any dispute arises as to the work done or the materials supplied such dispute is to be settled by arbitration. These two clauses are so inconsistent the one with the other that I must hold that the parties never came to any agreement as to the matters contained in them, and this seems to be the opinion of the parties themselves, because, when the agreement was properly drawn out and was submitted to the parties to sign, plaintiff signed only after the first clause was amended in such a way that if Crossley disapproved of the work or materials the matter was to be left to arbitration, which would make the one consistent with the other, but defendant refused to sign unless he had the right to dismiss plaintiff if Crossley disapproved.

Digitized by Google

The whole evidence shews that the parties were not ad idem as to the terms of the agreement, which would bring this case within the decision in Caerleon Tinplate Co. v. Hughes, 65 L. T. N. S. 118, that there must be an agreement between the parties in writing and signed by both of them before it comes within the Arbitration Ordinance. In this case there is no agreement between the parties, and I must therefore discharge the summons with costs to plaintiff in any event.

---

## NORTH-WEST TERRITORIES.

### (WESTERN ASSINIBOIA.)

NEWLANDS, J. MAY 26TH, 1905.

TRIAL.

## McAULEY v. DICK.

*Vendor and Purchaser—Contract for Sale of Land—Construction—Payment of Purchase Money by Instalments—Default in Payment—Failure of Crop—Cancellation for Default—Notice—Time—Action—Forfeiture.*

Action by vendor for the cancellation of an agreement for sale of land and forfeiture of the amount paid thereunder.

W. M. Martin, Regina, for plaintiff.

D. H. Cole, Indian Head, for defendant.

NEWLANDS, J.:—The facts are that defendant purchased from plaintiff a quarter section of land, upon which he paid $400 down, the balance to be paid in 6 annual instalments of $500 each, with interest at 6 per cent. No other payment than the first one was made by defendant. The agreement of sale contained a provision that if the purchaser through failure of crop in any year was unable to meet his payment the vendor should carry him over to the following year, providing the interest was paid; and the defence is that there was a failure of crop during the first year, and for that reason defendant was unable to pay the instalment due on

Digitized by Google

1st January, 1904, and he paid into Court the sum of $184.50, the interest due on said instalment to the date of payment. The evidence given at the trial shewed that there had been a part failure of crop in 1903, but that defendant had obtained more from the crop raised on this land than the amount paid into Court, but just what amount he obtained the evidence does not shew. What is meant in this provision by a failure of crop? I am assisted in coming to a conclusion by a subsequent provision in the agreement that any crop grown on said land in any year is not to be removed excepting for the purpose of making payment as therein specified; so I am led to the conclusion that if there is any crop the payment is to be made, and the failure of crop referred to is a total failure, and, as there was not a total failure, the payment due 1st January, 1904, should have been made.

This payment was not made. Time, however, was not of the essence of the contract, but plaintiff's advocate on 6th April, 1904, sent defendant the following notice: "On behalf of Neil McAuley, I hereby give you notice that unless the instalment of $680 due by you to Neil McAuley on account of purchase of the above land be paid by the 1st day of May, 1904, you will forfeit your part payment of $400 made on said contract, and an action will be commenced for the cancellation of the agreement."

Plaintiff argues, in effect, that this notice makes time of the essence of the contract, and that the agreement was cancelled on account of defendant not making the payment at the time mentioned therein. If time is not of the essence of the contract, it can be made so by notice, but I do not think that is the effect in this case, nor apparently did plaintiff think so, as he has brought his action for the cancellation of the agreement.

The law affecting agreements of sale is well settled, and I cannot do better than quote the remarks of Jessel, M.R., upon this subject in Dysard v. Edwards, 2 Ch. D. at p. 506. He says: "It appears to me that the effect of a contract of sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the Court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser, the vendor having a right to the purchase money, and a right to retain possession of the estate until the

Digitized by Google

purchase money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or a bare trustee, that is, a person without beneficial interest, and a mortgagee, who is not in equity (any more than a vendor) the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz., possession of the estate and a charge upon the estate for his purchase money. Their positions are analogous in another way. The unpaid mortgagee has the right to foreclose, that is to say, he has a right to say to the mortgagor, 'Either pay me within a limited time, or you lose your estate,' and in default of payment he becomes absolute owner of it. So, although there has been a valid contract of sale, the vendor has a similar right in a court of equity; he has a right to say to the purchaser, 'Either pay me the purchase money, or lose the estate.' Such a decree has sometimes been called a decree for cancellation of the contract; time is given by a decree of the court of equity, or now by a judgment of the High Court of Justice, and if the time expires without the money being paid, the contract is cancelled by the decree or judgment of the Court, and the vendor becomes again the owner of the estate."

I will therefore refer this case to the Clerk of the Court to ascertain the amount due under the agreement, and unless the same is paid to the plaintiff with his costs of action within 10 days after said amount is ascertained and costs taxed, the agreement of sale is to be cancelled and the amount paid thereunder forfeited.

---

## NORTH-WEST TERRITORIES.

### (EASTERN ASSINIBOIA.)

WETMORE, J. MAY 30TH, 1905.

CHAMBERS.

## McFEE v. YOUNG.

*Indemnity — Right to — Claim for Damages — Third Party Notice—Appearance — Objection on Return of Summons for Directions.*

The statement of claim sets up that one Hodgins was the owner of a certain quarter section of land, and that in the

Digitized by Google

month of April, 1903, he leased the land for that season to defendant, orally; that one of the terms of the lease was that defendant was to plough 28 acres of land in the autumn of 1903 or the spring of 1904, so that the land so ploughed should be ready for seeding in the spring of 1904; that he did not plough the land at all; that plaintiff bought the quarter section from Hodgins, together with Hodgins's interest in the lease; and that by reason of the neglect and refusal of defendant to plough the 28 acres, as agreed, plaintiff had suffered damage, through the land not being ready to be put into crop in the year 1904, and the consequent loss of crop occasioned by such default, and plaintiff claims $200.

Defendant applied for and obtained leave to issue a third party notice under Rule 60 of the Judicature Ordinance against Hodgins. By that notice defendant claimed indemnity from Hodgins against all liability in respect of the contract or any breach of it, on the following grounds: that at the time the lease was entered into Hodgins represented to defendant that about 28 acres of the land was summer-fallowed and in good condition; that in fact no part of said land was summer-fallowed or in good condition; that said 28 acres of land was badly infested with noxious weeds at the time of the representations, and in consequence thereof the government inspector of weeds, while the land was in crop during the year 1904, had such noxious weeds destroyed, and in so destroying them a large proportion of the crop on the land was destroyed; and he claimed damages to the extent of $261.33 against Hodgins in consequence of such summer-fallowing not being done, and by reason of the land being infested with weeds and the destruction of the crop in destroying such weeds. Defendant also set up that these representations as to summer-fallowing and as to the condition of the land were made by Hodgins at the time the defendant entered into a lease, and defendant was thereby induced to enter into such lease and to go into possession of the land.

Hodgins appeared to the third party notice, and defendant issued a summons for further directions under Rules 60 and 64 of the Judicature Ordinance (identical in substance with Rules 48 and 52 of English Order 16).

J. T. Brown, Moosomin, for Hodgins, on the return of the summons, objected that this was not a proper matter for the operation of the Rules referred to.

Digitized by Google

E. L. Elwood, Moosomin, for defendant, contended that leave having been obtained to issue a third party notice, and Hodgins having appeared to it, it was too late to take the objection.

WETMORE, J.:—I am of the opinion that the objection can be taken at this stage, and Baxter v. France, [1895] 1 Q. B. 455, is decisive upon that point.

I am also of opinion that this is not a case for indemnity or contribution within the meaning of the Rules. It is sufficient to state that this is practically decided by the cases of Catton v. Bennett, 26 Ch. D. 161; Birmingham Land Co. v. London and North Western R. W. Co., 34 Ch. D. 261; and The Jacob Christenson, [1895] P. 281. I can discover no claim that defendant has for idemnity as against Hodgins. It may be that defendant has a good right of action against Hodgins for damages, but that is not sufficient to create a right of indemnity or contribution under the Rules. There is no contract express or implied to indemnify, nor is there any such equitable relationship between the parties as to constitute a right of indemnity.

The Chambers summons will therefore be dismissed with costs to be paid by defendant to Hodgins, including the costs of his appearance to the third party notice.

---

## YUKON TERRITORY.

CRAIG, J. APRIL 19TH, 1905.

CHAMBERS.

### RE TJERSTROM.

*Administration—Supposed Death of Intestate—Evidence of Death—Application by Public Administrator for Letters of Administration.*

Petition by E. C. Senkler, Public Administrator, for letters of administration of the estate of Matthew Tjerstrom, described in the application as "supposed deceased."

No counsel appeared.

Digitized by Google

CRAIG, J.:—The only evidence of death given is contained in two affidavits, one of Major Cuthbert, commanding the North-West Mounted Police, who swears that he caused inquiries to be made as to the whereabouts of deceased, and the result of the inquiries was to the effect that the man was last seen on a certain evening of July in an intoxicated condition on the Klondike bluff road, and the supposition is that he fell into the Klondike river and was drowned. Constable Mapley, of the police force swears that he made the inquiries, and he draws the inference of drowning None of the facts which lead up to that inference beyond the fact that some one saw him drunk, are given.

The estate amounts to $1,588, composed of money invested in the Northern Lumber Company, salary due from the Northern Lumber Company, and personal effects. Certainly some evidence should have been given by the keeper of the boarding-house where the man lived as to whether his personal effects are there, when he was last seen there, why he has not returned, if that is known; also evidence from the Northern Lumber Company as to the disposition of his interest in that company, as to what knowledge they have of his next of kin or relatives or friends with whom he corresponded. His letters should have been produced shewing with whom he did correspond, and his correspondents should be communicated with. All this material should appear before the Court so that the Court itself might draw the inference, if justified in doing so, upon the facts surrounding his disappearance. Certainly if I thought I had the right on another branch of the case to grant the application at all to the petitioner I should not be satisfied with the evidence of death produced to me on this application.

Then as to the right of the Public Administrator to apply. The Public Administrator is by Act or Ordinance, ch. 21 of the Consolidated Ordinances of 1902, the Public Administrator in this Territory until letters of administration are granted by the proper Court to some person entitled thereto. He becomes by virtue of the Act and his appointment administrator without any order or direction of the Court, and all persons in whose charge or care any person dies are called upon by the Act to forthwith communicate with, and hand over all the effects of the deceased to, the Administrator. Section 6 of the Act is quite explicit in saying that certain Rules of Court contained in the Judicature Ordinance shall

Digitized by Google

not apply to the Public Administrator, who shall "without order" exercise the powers and perform the duties in such mode as to administer the estate which comes into his hands in a speedy and inexpensive manner, etc.

I think that Mr. Senkler has no more right than any other person in this Territory to apply to the Court, under his general powers, to appoint him administrator. He must either take his position as Public Administrator with the powers given to him by the Act, or he has to apply as any other person would apply. The next of kin would have to be cited or got rid of in some other way in this case, or Mr. Senkler would have to shew some special right entitling him to make the application before I would grant it, and he would certainly have to give bonds to this Court, if appointed under the ordinary powers of the Court. I would no doubt be disposed to consider an application by the Public Administrator more favourably than one by any other person, the next of kin being disposed of, because his very appointment by the government is a recognition of him as a suitable person to administer such estates, and he carries, if I may use that expression, the sanction and authority of the government that appoints him with him. However, as I have said, he must take either one position or the other, and I see no difficulty in his taking the position as Public Administrator, and nothing has been laid before me to warrant or justify an application in this form in this case. The only thing which has been suggested is that the evidence of death is not sufficient, but if it is not sufficient for the Public Administrator it certainly cannot be sufficient for me, and I think that in this unsettled Territory, where these extraordinary provisions are made, less evidence of death would justify the administrator in proceeding to guard the estate than would justify the Court in making an order upon an application of this nature, and I therefore can see no difficulty at all in Mr. Senkler proceeding under his ordinary powers and functions as Public Administrator, taking such evidence as will satisfy him in presuming the death of the person described as "supposed deceased."

I therefore refuse to grant the application on the material before me now.

Digitized by Google

## YUKON TERRITORY.

CRAIG, J. MAY 3RD, 1905.

CHAMBERS.

### RE REX v. FLYNN.

*Justice of the Peace—Jurisdiction—Summary Trial—Charge of Keeping Common Gaming House — Interpretation of Criminal Code.*

Motion by defendant for prohibition to T. A. Wrighton, a commissioned officer of the North-West Mounted Police, to prohibit him from summarily trying the defendant upon a charge of keeping a common gaming-house.

CRAIG, J.:—The information in this case was laid against Flynn for being the keeper of a common gaming-house under secs. 196 and 198 of the Criminal Code. On the preliminary hearing before the magistrate, who, it is admitted, has the power of two justices of the peace, and otherwise would have jurisdiction to try the case, it was objected that he had no jurisdiction to try the case in a summary manner without the consent of the accused, and that sub-sec. (f) of sec. 783 of the Code did not give him that jurisdiction, and this is a motion for a writ of prohibition. Sub-section (f) allows the magistrate to try summarily, without the consent of the party, charges for keeping or being an inmate or frequenter of "any disorderly house, house of ill-fame, or bawdy house." These offences are defined in the Code in sec. 195 et seq. Under the general heading in the Act "Disorderly Houses Defined," 195 defines a common bawdy house; 196, a common gaming-house; 197, a common betting-house. Section 198 defines keeping a disorderly house and is as follows: "Every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy house, common gaming-house, or common betting-house, as hereinbefore defined." The words "as hereinbefore defined" seem to me to be important in view of the argument raised befrore me. The contention of the counsel for the accused is that the rule "noscitur a sociis"

Digitized by Google

is applicable to the interpretation of this sub-section, and that the expression "any disorderly house," being a general expression, is limited and narrowed by the words following, "house of ill-fame or bawdy house," and that the disorderly house which comes under the jurisdiction of the magistrate in this section should be of a like nature with a house of ill-fame or bawdy house; that these being specific offences the general term is limited and qualified by them, and it does not matter whether the general term, which was said to be in the argument generic as against specific, follows or precedes the specific words or offences. I do not intend to enter into any discussion of the question whether it makes any difference that the general words follow or succeed the specific words. In the view which I take of the case, that discussion is unnecessary. What I wish to arrive at and what should be arrived at is—what is the meaning of the Act? Firstly, I do not think that the expression "disorderly house" in sub-sec. (f) can now be called a general expression under the Code. It is just as specific as "house of ill-fame or bawdy house," because the very Code under which we are proceeding interprets and defines that expression. Section 198 is quite clear and is enacted for the very purpose, it seems to me, of defining exactly what is a disorderly house. The general heading preceding sec. 195 would lead to the conclusion that the legislature intended to put beyond any doubt their meaning when they proceeded to define disorderly houses and classified among these, bawdy houses, gambling houses, and betting houses. In sec. 207 of the Act a disorderly person is again defined, and among other classes of disorderly persons, we find a disorderly person to be one who for the most part supports himself by gaming.

I therefore think that the intent of the Act in this connection, and read as one comprehensive and consistent code, is to define and specify a disorderly house and to give jurisdiction to the magistrate to try these offences. I cannot see any reason why that should not be so, because, although it is an indictable offence, yet the magistrate has jurisdiction to try other indictable offences, and the penalty imposed in the other classes of cases, that is, for keeping a house of ill-fame or bawdy house, is precisely the same penalty as is imposed for keeping a disorderly house, which would be a gaming house. I think we do no violence to the Act at all to give that interpretation to the words, and a reasonable



Digitized by Google

meaning can be given to the Act without applying the rule "noscitur a sociis." Stroud in his Judicial Dictionary defines a disorderly house as "A common bawdy house, common gaming house, common betting house, disorderly place of entertainment." The whole Act should be read together, and for authority upon this I would refer to the American and English Encyclopædia of Law, 2nd ed., vol. 26, pp. 608-9-10-11-12-16-17, and there it is laid down that the legislative intent must be arrived at from a reading and interpretation of the entire Code, and I can come to no other conclusion, from a reading of the entire Code, than that the intention of the legislature was to give jurisdiction in such cases.

Two conflicting authorities have been cited to me, namely, the case of The Queen v. France, 1 Can. Crim. Cas. 321, being a decision of the full Court of Queen's Bench in Quebec; and the case of Ex p. Cook, 3 Can. Crim. Cas. 72, being a decision of Mr. Justice Drake of the British Columbia Court. These take directly contrary grounds. In the case decided in the Quebec Court, Bosse, J., gives a dissenting judgment, and I concur in that dissenting judgment rather than in the judgment of the full Court. I may say that cases of this class are being constantly tried in the province of Ontario before police magistrates, and I am unable to find any reported case where this point has been decided. Gambling cases have gone up on other points and on reserved cases before the full Court, and this question seems never to have been raised. This, of course, is a very negative argument to use, but it seems to me that the point would long ago have been raised there if it had been considered as having any force or validity. Apart from that, I am of opinion, on a reading of the Act, that this motion should be refused with costs.

---

## YUKON TERRITORY.

CRAIG, J. MAY 26TH, 1905.

CHAMBERS.

### STEARNS v. KIMMELL.

*Evidence—Foreign Commission—Examination of Defendant and Witness abroad—Failure to Make Case on Application.*

Motion by defendant for the issue of a commission to

Digitized by Google

take, the evidence of defendant and his mother in British Columbia.

G. Black, for defendant.

R. L. Ashbaugh, for plaintiff.

CRAIG, J.:—The action is one for damages for assault. There is no affidavit put in by defendant as to the evidence which he can give or proposes to give. Neither is there any affidavit as to what evidence particularly his mother can give. There is an affidavit of a friend, who only swears to what one would naturally infer from the pleadings in the case, that is, that the defendant himself will be a material witness. It seems to me that at least there should have been some preliminary examination of the plaintiff and some averment on the part of the defendant of what particular evidence he can give in contradiction. The idea that a commission will issue as a matter of course is wrong. The parties are bound to attend themselves and appear in the witness box, so that the Judge and jury may see them and their demeanour in the box, unless exceptional circumstances are shewn to justify the issue of a commission and the taking of the evidence of the parties otherwise than in the hearing of the Court. As a rule—and I think there is no doubt about this principle in general—the interests of justice are best served by a personal attendance of the parties and also of the witnesses where possible. I quite conceive that in this country conditions are peculiar, and that commissions ought to issue with more readiness here, particularly at certain seasons of the year; but in the summer season when communication is easy there should be no difference between this Territory and any other place with easy communication. Witnesses have been compelled and parties have been compelled to go all the way from the United States to England, even from Africa to England, to give evidence.

On the question as to the material which should be put in to justify the issue of a commission, see the case of Smith v. Greey, 10 P. R. 531. There it is clearly laid down that the defendant must shew what evidence he expects to give. Also the case of Thomas v. Story, 11 P. R. 417, upon the other points raised. Also see Kidd v. Perry, 14 P. R. 364. In his judgment in that case Boyd, C., says that "the issue of a commission is a question going to the discretion of the

Digitized by Google

Court, and this discretion will be more strictly exercised where the proposal is to examine an absent party on his own behalf." "As to the other witness," the Chancellor says, "the matter is more doubtful, but I think the absence of the usual affidavit as to her being a necessary and material witness and the omission to state any reason why she cannot appear in due course at the trial should prevail." Also see Porter v. Boulton, 15 P. R. 318. That was a case of an application for a foreign commission to take the defendant's evidence on his own behalf in England, which application was refused. It was a matter of complicated accounts, and it was shewn that the expenses of the commission would be greater than the travelling expenses from England. The only reasons given for the alleged inability of the defendant to attend were engagements in England, want of time and money; and in that case the Court drew the distinction between parties who are resident abroad at the time of the action and who had their regular home there, and parties who are resident in the country where the action was brought at one time and left after the cause of action arose, which is the case before me. There is also the case of Lawson v. Vacuum Brake Co., 27 Ch. D. 137, the head-note in that case being, "Where it is sought to have a material witness examined abroad, and the nature of the case is such that it is important that he should be examined here, the party asking to have him examined abroad must shew clearly that he cannot bring him to this country to be examined at the trial."

Putting the matter shortly, there is no doubt as to the prima facie right of a party to have the witnesses who are to give evidence against him, present in Court; the burden lies upon the party asking any indulgence in the way of commission and for special terms to suit the case, to justify the Court in departing from the usual rule that the witnesses should attend in person. Now, there is no material at all here to shew why the defendant should not attend in person; in fact there is an entire absence of material. Nothing is shewn as to the difference in cost, the circumstances of the party, or why he should not attend, and I cannot upon the material before me grant the order in this case.

The motion will be dismissed with costs.

Digitized by Google

## YUKON TERRITORY.

CRAIG, J. MAY 26TH, 1905.

CHAMBERS.

### HOGAN v. BACTZ.

### HOGAN v. BACTZ AND TAYLOR.

*Parties—Addition of Co-plaintiff — New Cause of Action— Rule 26.*

Motion by plaintiff under Rule 26 to add a co-plaintiff, namely, one Winscott, in each action.

A. Davey, for plaintiff.

G. Black and K. Macrae, for defendants.

CRAIG, J.:—"Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Judge may, if satisfied that it has so been commenced through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order that any other person be substituted or added as a plaintiff on such terms as are just:" Rule 26.

There must be, it is clear, a bona fide mistake, and it must appear that the addition is necessary for the determination of the real matter.

The action is brought upon a promissory note, of which the following is a copy:—

> "$1,000, Helena, Montana, August 20th, 1900. Ten months after date without grace for value received I promise to pay to the order of John Winscott one thousand dollars in lawful money of the United States negotiable and payable at the office of John Winscott or attorney without interest before and after maturity at the rate of no per cent. per from date until paid, interest payable, etc. The makers and endorsers hereby waive presentment, demand, protest, agree to pay reasonable attorney's fees in case of suit on this note. Henry Bactz. (Indorsed) John Winscott, Thomas Hogan, attorney, John Winscott."



Digitized by Google

It appears by the material that this note was transferred to Hogan, and he proceeded to sue for collection of it. On the issue of a commission, the evidence shewed that the note was indorsed by Winscott to Hogan, who was his attorney in fact, with directions for collection only; that Hogan was not the beneficial holder of the note. Now, a doubt arises as to whether that is a note collectable here or not. I am satisfied that the suing in the name of Hogan alone was a bona fide mistake, and that mistake was not discovered until the commission evidence was taken; that it is material that Winscott should be a party in order to determine the real matters between the parties. It is not adding a party to create a new cause of action or giving to Hogan or to anybody else to be added as a plaintiff a right which did not exist by virtue of the original action. The action is upon a note or upon a debt evidenced by the note. It is the recovery of that debt and no other that is being sought in this action, and the addition of Winscott does not alter or affect the matter, to my mind, in the slightest, as to the actual rights to be tried upon the issue as first raised in the action. Upon this matter I think there is ample authority. I first cite the case of Tinning v. Bingham, 16 P. R. 110. That action was brought by one of the next of kin to set aside as having been obtained by undue influence a transfer to the defendant of policies on the life of a person who had died intestate, and subsequently his administrator was on his own consent added as a party plaintiff after the action was entered for trial. The plaintiff's solicitors, also acting as solicitors for certain creditors of the deceased, obtained an order under Rule 445 from the Master in Chambers to amend the statement of claim and record by making such creditors parties suing on behalf of themselves and all other creditors to set aside the transfer of the policies as fraudulent and void against them. It was held that the addition of the new plaintiff was not necessary to determine the real matter in dispute in the action commenced as required by the Rule, but was the introduction of a new action altogether distinct from the action commenced, and one which the plaintiffs in that action could not maintain. The matter went before the full Court, and the judgment was delivered by Armour, C.J., and he there drew the distinction which I have already drawn, that the parties could not be added for the purpose of creating a cause of action distinct from that originally sued upon, but where

Digitized by Google

the addition was to completely try the issue originally raised and to add necessary parties for the trial of that issue, then when the conditions of the Rule were complied with, the parties should be added; that is, putting it again, when the action was commenced through a bona fide mistake and it was necessary for the determination of the real matter in dispute to add them, parties can be substituted or added. And the dicta of the learned Judge referred to the action as commenced, and his rulings were directed, it seems to me, to that point.

The Rule in England and in Ontario prevents the addition of a party without his consent. Our Rule is different, and I do not think that consent is necessary here. I would presume, however, that a strong case should be shewn to compel a person to be a party without consent. However, that question does not arise here, as the consent is given. It is said in this case that the action could not be maintained by Hogan. That is doubtful, to say the least of it. The peculiar form of the note may make that question one of some doubt; but I think the Rule anticipates such a matter where it says "where it is doubtful whether it has been commenced in the name of the right party or not," the addition or substitution may be made, and it is by no means admitted that Hogan could not maintain this action himself as being the holder of the note. However, I will not decide that question now. I do not think this case comes under the cases of Tinning v. Bingham and Blackley v. Dooley, 18 O. R. 381, which decide that a new cause of action cannot be created. The case of Turquand v. Fearon, 4 Q. B. D. 280, was cited to me, but I think that case can be distinguished from this as not being in point. There was also cited to me the case of Walcott v. Lyons, 29 Ch. D. 584. In that case the tenant for life of a trust fund brought an action against the trustees to make them liable for an improper investment. The trustees by their defence alleged that they had made the investment in question at the request of the plaintiff. The plaintiff thereupon applied for leave to amend by adding as co-plaintiff his son who had the reversionary interest in the fund, and Bacon, V.-C., made an order giving him leave. It was held on appeal that "the order must be discharged because Rule 16, Order 11, does not authorize the allowing a plaintiff who has no right to sue, to amend by joining as co-plaintiff a person who has such right." I think that case

Digitized by Google

is also distinguishable from this. Cotton, L.J., in his judgment said: "The defence alleges that the investment was made at the request of the father. The father then applied for leave to join a son as co-plaintiff. Because it may turn out that the father has no right to sue, it cannot be said under these circumstances that the presence of the son was necessary to enable the Court to adjudicate upon all the questions involved in the cause. I am of opinion that it cannot. The object of the amendment is that if it is shewn that the father had no right to sue, there may be a plaintiff who has such a right. It is contended that the main question in the case is whether there has been a breach of trust. That is not so. The question in the case is whether there has been any breach of trust of which the father has a right to complain? I think that quotation would distinguish that case from the one I am considering. The father brought an action for an injury to his own interest. The defendant justified by acquiescence by the father, which was justification. It would seem to me to be clear that the father having no right to sue could not, to bolster up a defective action, bring in his son, who had an entirely different right, for the reversionary interest, and make him a party to make good an action originally bad so far as he was concerned. In this case which I am considering the action is upon a note—one debt—which some one, either Hogan or Winscott or both, has a right to recover from the defendant if they prove the debt. I would also refer to the case of Hughes v. Pump House Hotel Co., [1902] 2 Q. B. 485, where it was held that where an action has through a bona fide mistake been commenced in the name of the wrong person as plaintiff, the fact that the original plaintiff has no cause of action does not take away the jurisdiction of the Court to order the substitution of another person as plaintiff. This case seems to go further than any of the others, and to my mind is conclusive upon the application.

The order therefore will be that Winscott be added as a party plaintiff upon terms that the costs of this motion be paid by plaintiffs to the defendants in any event of the cause, and that the plaintiffs give security in the sum of $400 for the costs of the action, Winscott being resident out of the jurisdiction.

Digitized by Google

## YUKON TERRITORY.

CRAIG, J. MAY 29TH, 1905.

CHAMBERS.

### WILSON v. RANNIE.

*Evidence — Cross-examination on Affidavit Used in Answer to Interlocutory Motion—Original Document—Compelling Witness to Produce.*

Motion by defendants to compel the production of original documents by a witness being cross-examined upon his affidavit.

A. Davey, for defendants.

K. Macrae, for plaintiff.

CRAIG, J.:—A motion was first lodged to compel the giving of security for costs by plaintiff, the material filed therein shewing that plaintiff Wilson is insolvent and that he has assigned all his book debts, including this debt, to the Canadian Bank of Commerce, who are the parties beneficially interested in the result of the suit; that Wilson has no interest in the matter, and is simply lending his name at the instigation of the bank to carry on this suit for the benefit of the bank only. Upon that motion Mr. Sanson, who swears that he is a clerk in the Canadian Bank of Commerce, testifies that he has read the affidavit filed upon the motion, and further says that plaintiff has assigned to the bank certain book debts, including the debt sued upon; that such assignments were made as collateral to secure the payment of his debt to the bank; that plaintiff has a real and substantial interest in the debt, and is not merely a nominal plaintiff; and in answer to the allegation made by one Tobin, a deponent, that Sanson has taken a very active interest in the advancement of the suit, denies that he is aware that he has exhibited any particular interest. Tobin's affidavit also proves the insolvency of Wilson and the assignment of his book debts to the bank.

No evidence connects the bank with the action beyond the suspicion created by the affidavit of Tobin that Sanson

Digitized by Google

has been taking an active interest in the advancement of the action.

Upon this affidavit of Sanson he was cross-examined, and upon that cross-examination he was asked for the production of the original assignment which he referred to in his affidavit. In lieu of the original he produces a copy in page which he says is "just the same as this, with the exception that where the blank line appears in the copy the total amount of dollars is filled in; that amount is the total of six sheets attached." Mr. Davey, counsel for the defendants, objects and asks for the original document. Sanson objects by his counsel to produce, on the ground that "the assignment referred to "contains other matters not relevant to this issue, and upon which Mr. Davey is not entitled to examine nor to have production on the examination; that it is impossible to produce it without giving information on other matters in the hands of the bank, which the defendants are not entitled to have; that it is material in another suit entirely between different parties on questions not involved in this action;" and declines to produce the original.

As to whether or not upon the original motion plaintiff would have succeeded I need not express any opinion. The matter before me now is whether a copy can be produced in lieu of the original. Mr. Sanson takes the ground that he is not compelled to produce the original. I think he is wrong there. The original must be produced. How much or how little of it is to be read is a matter for the examiner in the first place to determine. That which relates to other matters not involved here of course could not be read unless it throws some light upon this issue. Mr. Sanson took no other ground but the one I have mentioned. He certainly had the original in his possession at one time, or he could not have made a copy. He must at that time have had some control over the document. His interference in the action by affidavit changes his position. He has seen fit to go into it and make an affidavit. Perhaps he was compelled to do so by the affidavit of Mr. Tobin, which mentioned him, or he may not have been compelled to do so. That is a question of tactics in the action. In the meantime I must take him upon his own ground. Great care will have to be exercised in examining this document. The examiner will first peruse it to see whether or not it contains matters not relevant to this issue and which should not be read.

Digitized by Google

I have read the authorities upon the original motion for security for costs, and from the view which I take of them I am led to say that this witness should not be compelled to produce any document in the possession of the bank over which he has any control, and which does not affect this suit, until the defendant first establishes that the bank has actively interfered in this action, because I am convinced that, apart from the question of the proof of Wilson's insolvency and his want of interest in the action, it must also be established that the bank have actually and directly inspired the suit and are carrying it on. Insolvency is no reason for ordering security for costs. There must be the want of interest in the party—the nominal plaintiff—who must be lending his name to some other person who is actively advancing the suit before security can be ordered, and it must be shewn, I take it, that the bank are taking that interest in the action which I have indicated; and that would seem to be a preliminary investigation before the examination of the document.

In the meantime the order will be that the witness attend at his own expense on a day to be fixed by the clerk, to be further examined and to produce the original document. Costs reserved.

---

## YUKON TERRITORY.

CRAIG, J. MAY 30TH, 1905.

CHAMBERS.

### CANADIAN BANK OF COMMERCE v. CARBONNEAU.

*Discovery—Production of Documents — English Practice—Payment of Costs of Discovery—Incorporated Company—Selection of Officer to Make Affidavit on Production.*

Motion by defendants for an order dismissing action for want of prosecution and for non-compliance by plaintiffs with an order to produce.

J. B. Pattullo, for defendants.

Frank R. Stacpoole, for plaintiffs.

Digitized by Google

CRAIG, J.:—Plaintiffs to justify their non-production say that defendants should, under the English Rules 25 and 26 of Order 31, pay in the costs of discovery under that Rule, and argue that that Rule is embodied in our practice. The Rule under which the motion is launched is Rule 190, which is almost identical in words and effect with the Ontario Rule 439. I do not think the English Rule applies here at all, nor the English practice respecting affidavits of documents. This matter came up already before Mr. Justice Dugas, where the very same question was argued upon a motion made on behalf of plaintiffs to set aside the order for discovery, and he there held that the English Rule did not apply, and I agree with his finding upon that branch of the case. See ante, p. 262. Plaintiffs are bound to make discovery in the ordinary way.

Mr. Stacpoole, for the plaintiffs, raised another point; that the order should indicate what officer of the plaintiffs, they being an incorporated company, should make the affidavit. I do not think that is at all required by the Rule or practice. The plaintiffs themselves take the responsibility of selecting the officer who has the knowledge necessary to make the affidavit, and if the defendants, issuing the order, are not satisfied with the affidavit, they may call for a further and better affidavit, or they may examine the officer making the affidavit or any other officer of the corporation that they can convince the Court is necessary to be examined for discovery, upon the documents, and ascertain whether the proper officer, who has full knowledge of the matter, has made the affidavit or not.

I think this matter having been fully threshed out before Mr. Justice Dugas, plaintiffs are unnecessarily harassing defendants in refusing this affidavit. I will not dismiss their action, but will give them another chance to comply with the order, and in 5 days after service of this order upon them they will file their affidavit on production pursuant to the order and pay the costs of this motion upon taxation.

Digitized by Google

THE

# Western Law Reporter

VOL. I. TORONTO, JULY 3, 1905. No. 9.

## MANITOBA.

PERDUE, J. JUNE 5TH, 1905.

TRIAL.

### MINUK v. WHITE.

*Landlord and Tenant—Forfeiture of Lease—Breach of Covenant not to Sublet without Leave — Acquiescence —Waiver—Breach of Covenant to Repair.*

Action to recover possession of hotel premises and for forfeiture of lease on breach of covenant not to assign without leave, and covenant to repair.

In September, 1903, plaintiff leased the hotel premises to one Alex. Frank for a term of 5 years, from 1st January, 1904. The lease contained a clause not to assign or sublet without leave, but, if the assignment was to some person thoroughly respectable and reliable in every way, the lessor would consent to an assignment. There was a proviso for re-entry on non-payment of rent or non-performance of covenants.

On 16th November, 1903, Frank assigned his interest under the lease to Mary Jane White and H. J. Latourelle, to which assignment Minuk consented, and subsequently Latourelle assigned, with Minuk's consent, his interest in the lease to M. J. White. She entered into possession, and in October, 1904, without his consent, as plaintiff alleged, transferred the premises to A. E. Fulljames, who took possession.



Digitized by Google

When plaintiff became aware of the last transfer he notified defendants that the lease had been forfeited, and demanded possession. The demand was not complied with. He then brought this action to recover possession, and for a declaration that the lease was forfeited.

Mrs. White alleged that prior to the assignment to Fulljames she requested Minuk to consent to the same, when he told her he was willing, but that a written consent was not necessary. Fulljames set up that Minuk accepted rent from him until October, 1904, and since then each month's rent had been tendered to him; moreover, that Minuk encouraged him (Fulljames) to expend moneys upon the premises, and assisted him to obtain a license to sell liquors, so by his acts Minuk was estopped from saying that he did not consent to the assignment.

C. P. Wilson and J. A. Machray, for plaintiff.

H. M. Howell, K.C., and H. W. H. Knott, for defendants.

PERDUE, J.:—I think the evidence given by plaintiff was very unsatisfactory. He stated to Mr. Andrews, who acted for Fulljames, that he was glad to have the latter as his tenant. When Mrs. White was in possession Minuk had waived his rights against the furniture for rent, because Mrs. White was buying it on the instalment plan, but he seemed pleased to have Fulljames because he intended to pay cash for the furniture, and that would be a security for the rent, if necessary. Minuk was aware that Fulljames was negotiating for an assignment of the lease from Mrs. White, and encouraged Fulljames to proceed; at an interview at Messrs. Andrews & Andrews's office he orally consented and held out that he would accept Fulljames as a tenant. Further, Fulljames, acting on that statement, furnished the hotel and procured the license in his name, and, with knowledge of the assignment, Minuk accepted rent from Fulljames, and was always in the hotel and was aware that Fulljames was the proprietor. He did not insist on any forfeiture until later on in the year, when he tried to bring pressure on Fulljames to extort more rent from him.

There must be a verdict for defendants with costs.

There was a waiver by plaintiff of the covenant against subletting, and he had failed also in his claim for forefeiture for breach of the covenant to repair.

Digitized by Google

## MANITOBA.

JUNE 9TH, 1905.

FULL COURT.

## PENNER v. WINKLER.

*Ejectment—Right of Action by Owner of Reversion—Rights of Lessee—Entry by Lessee—Exclusive Right—Oral Lease —Agreement as to Crops.*

Plaintiff held from one Von Niessen a deed of the land in question, which deed, though absolute in form, was in effect a mortgage, the payments on which were in arrear.

Plaintiff let the land for a year from 1st October, 1902, to defendant Winkler, who allowed Von Niessen to remain in possession. There was a clause in the lease allowing an incoming tenant to enter for the purpose of fall ploughing.

One Nichol agreed orally with plaintiff that he would lease the land, as plaintiff's tenant, from the end of Winkler's term. He entered during Winkler's term and did fall ploughing. It seemed uncertain whether he finished during, or after the expiry of, that term. Finding that Von Niessen objected to giving him possession, Nichol took no further action beyond the fall ploughing, and never made any other entry. Plaintiff brought this action against Winkler and Von Niessen, to recover possession.

Von Niessen's statement of defence offered to redeem the lands.

The action was tried before PERDUE, J., who gave judgment allowing Von Niessen to redeem, and ordering that plaintiff should have immediate possession.

Von Niessen appealed against so much of the judgment as ordered delivery of possession, taking the ground that plaintiff had let the land to Nichol for a term that had not expired when the action was begun and had parted thereby with the right to possession during that term.

The appeal was heard by DUBUC, C.J., and RICHARDS, J.

C. P. Wilson, for appellant.

C. H. Campbell, K.C., A.-G., for plaintiff.

Digitized by Google

DUBUC, C.J.:—There is no doubt that a lessee, even before entry, can maintain ejectment against any one wrongfully in possession: Cole on Ejectment, p. 459; Doe dem. Parsley v. Day, 2 Q. B. 156.

But no authority has been cited in support of the proposition that the lessee has, in every instance, the exclusive right to bring said action, and that it cannot be brought by the lessor. In the present case can it be held that Nichol is clothed with that exclusive right, and that plaintiff is precluded from bringing an action to recover possession of his lands, even when Nichol does not take or care to take any steps to get possession?

Nichol had only an oral lease. He was to have the land for one year and was to give one-third of the crop to plaintiff. That is all we know about it. It is a very indefinite agreement. There is nothing to shew how many acres he was to cultivate, or even that he was bound to put in crop any number of acres. Was he to cultivate the whole 240 acres, or 100 acres, or 5 acres? The evidence does not shew. Where was he to deliver that one-third of the crop? Was it to be delivered on the field before threshing, or after threshing, or at the nearest elevator, or at any other place? Nothing said about it. The evidence shews that he went on the land in September, 1903, while the land was still in the possession of the Von Niessens, under Winkler's lease; and that he ploughed 40 acres. He made no arrangement with the Von Niessens, and never went near the house where they were living. He seemed to be rather indifferent about getting the farm. He said he looked to plaintiff to get him possession. On being asked, "Do you expect to go on and sow the 40 acres this spring?" he answers, "If I cannot get possession I would not bother about the 40 acres." He is further asked, "Do you expect to go on and crop these 40 acres?" His answer was, "If I don't get my work paid, I expect to get it seeded if there is not much trouble about it. I expect to sow it if Penner does not pay me for it and if there is no trouble."

With that indefinite and inchoate agreement between Nichol and plaintiff, and that disposition of Nichol not to face any trouble or bother about it, relying entirely upon plaintiff to get possession, I do not see how it should be held that Nichol had the exclusive right to sue for possession and that plaintiff is precluded from bringing the action.

Digitized by Google

The Court held in Coe v. Clay, 5 Bing. 440, that he who lets, agrees to give possession, and not merely to give a chance of a lawsuit. That was followed in Jenks v. Edwards, 11 Ex. 774.

In the present case, when Nichol appeared so indifferent as to whether he would get the land or not, was there for plaintiff no remedy whatever to get possession of his land wrongfully held by defendants? Without deciding whether Nichol could or could not bring an action to recover possession of the land, I feel satisfied that, in the circumstances of this case, plaintiff was entitled to bring the action, and, in my opinion, the judgment of Mr. Justice Perdue should be affirmed, and the appeal dismissed with costs.

RICHARDS, J., gave reasons in writing for the same conclusion.

---

## MANITOBA.

JUNE 9TH, 1905.

FULL COURT.

### BELL v. WINNIPEG ELECTRIC STREET R. W CO.

*Street Railways—Injury to Passenger Alighting from Car—Negligence—Injury by Car on Parallel Line—Invitation to Alight—Contributory Negligence.*

Plaintiff was a passenger on a crowded west-bound car of defendants on Portage Avenue, Winnipeg, on which he had paid the usual fare. When the car stopped, to let plaintiff and others alight, he got off at the end of the car nearest to him, which was the front end. In doing so he had to go out of the south side of the front vestibule, close to a track south of and parallel with the one on which the car he was leaving stood, on which parallel track cars of defendants ran easterly. The tracks were 7 feet apart at the place where plaintiff got off, but the overhanging sides of two cars passing each other there, would be only 44 inches apart.

Plaintiff stepped outwards from the car, in a southerly direction, towards the parallel track, being obliged so to do by the presence of a passenger who stood on the step.

Digitized by Google

As he alighted, and before he could get control of or look about himself, he was struck and severely injured by one of defendants' east-going cars, running on the parallel track.

The case was tried before PERDUE, J., who entered a verdict for plaintiff for $750 (24 C. L. T. Occ. N. 155.) Defendants appealed.

J. H. Munson and D. H. Laird, for defendants.

A. B. Hudson and H. Ormond, for plaintiff.

The judgment of the Court (DUBUC, C.J., RICHARDS, J.), was delivered by

RICHARDS, J.:—The trial Judge found that the east-going car was running rapidly when plaintiff was struck, and that the motorman did not sound the gong on the car, or take any precautions as he approached the other car. The evidence fully justified that finding.

At the trial it was apparently argued that plaintiff was guilty of contributory negligence in that he got off at the front end. But on the argument of the appeal it was admitted that defendants' custom had been to permit passengers to alight at the front of cars.

Plaintiff, therefore, was invited to get off at either end, and chose the front, the one nearest to him. It was the duty of the motorman on the eastgoing car to take notice that it was an hour of the day when cars were usually crowded, and to know that passengers were likely to get off at the front end of the westgoing car, which he saw was stopping to allow passengers to alight, and to take all reasonable precautions both to warn such alighting passengers of the approach of his car, and to avoid injuring them. He made no effort to warn them, or to avoid the risk of injuring them. The injury sustained by plaintiff was, clearly, in my opinion, the direct result of that motorman's negligence.

The trial Judge held that plaintiff was entitled to assume that he might alight in safety and cross the defendants' adjacent track to the sidewalk, without danger of being injured by any car of defendants on that track.

While I incline to agree as to plaintiff's right to expect that he might cross the track in safety, that point does not seem to me to call for decision.

Digitized by Google

It is, I think, sufficient for the decision of the present case, to hold that plaintiff was, at least, entitled to expect that, as far as the acts of defendants' servants were concerned, he might alight in safety, and would have a reasonable time, after alighting, to look about so as to guard himself against injury from other cars of defendants.

He was not given that time, or allowed to alight safely. His step downward and outward to the surface of the street, threw him against the rapid running eastbound car. In my opinion, the plaintiff was not guilty of contributory negligence of any kind.

Among the many cases cited for the defence one or two contained expressions in the judgments, that from the moment a passenger's foot touched the ground a street railway company's liability for his safety from injury by their other cars, ceased.

Such expressions are mere obiter dicta. In the cases where they were used the passengers had, after alighting, time to look about and to provide for their further safety. None of the cases cited seem to me to bear out such dicta.

In my opinion, the appeal should be dismissed with costs.

---

## MANITOBA.

JUNE 9TH, 1905.

FULL COURT.

### ALLOWAY v. RURAL MUNICIPALITY OF ST. ANDREWS.

*Real Property Act — Application for Certificate of Title — Caveat by Purchaser at Tax Sale—Subsequent Acquisition of Title from Grantee of Crown—Second Caveat while first in Force—Leave to File—Necessity for Order—Construction of Statute — Postponement of Trial of Issues under first Caveat.*

Plaintiff was the grantee of the land in question under a tax deed issued by defendants, within whose territorial limits the land was situate. A subsequent tax sale took place; defendants became the purchasers at this later sale, and a vest-

Digitized by Google

ing certificate was issued to them. They then applied for a certificate of title under the Real Property Act. Notice was served on plaintiff, and he filed a caveat claiming the land under his tax deed. An issue was directed to try the question whether plaintiff became the owner in fee simple by virtue of the tax sale to him, to be followed, if plaintiff succeeded, by a further issue in which the question to be tried was whether defendants became owners of the land in fee simple by virtue of their vesting certificate and its registration.

The above issues were not tried, and while they were pending plaintiff obtained, as he asserted, title to the lands under a deed from the original grantee from the Crown. Plaintiff then applied for an order giving him leave to file a new caveat claiming title to the lands under the deed from the patentee from the Crown, and for an order that the trial of the above issues be postponed for a sufficient length of time to enable proceedings to be taken upon such new caveat, and the issue, if any, directed, consolidated with the issues already directed. The application was heard by RICHARDS, J., who dismissed it: 24 C. L. T. Occ. N. 248. From that decision the present appeal was brought.

T. G. Mathers, for plaintiff.

F. Heap, for defendants.

The judgment of the Court (DUBUC, C.J., PERDUE, J.), was delivered by

PERDUE, J.:—The motion for leave to file a second caveat was made by reason of the devision in Frost v. Driver, 10 Man. L. R. 209. In that case it was held by Bain J., that a party claiming an interest in land can file only one caveat on the application to bring the land under the operation of the Act; that when a caveat has been filed the authority given by sec. 127 has been exercised, and no further caveat can be filed under it. Plaintiff asked for a Judge's order under sec. 140, giving him leave to file the second caveat.

The case of Frost v. Driver was, no doubt, well decided upon the facts involved in that case. The caveators in that case appear to have filed two successive caveats upon exactly the same interest and without obtaining a Judge's order permitting them so to do. This is something the statute says

Digitized by Google

they must not do. But if Frost v. Driver is sought to be invoked to prevent a party from filing a caveat as to an estate or interest acquired after the filing of the first caveat, and not possessed by him when he filed his first caveat, I must dissent from the view that it extends to such a case. A brief examination of the earlier Real Property Act in connection with the present one and with the Australian Acts from which ours was derived, will make this point clear.

The Real Property Act of 1885 opens with a recital which expresses the object of the legislature in passing it, and gives us a key to its interpretation and to the proper construction of the various amendments and revisions which have resulted in the present Act. This recital is as follows:—" Whereas it is expedient to give certainty to the title to estates in land in the province of Manitoba, and to facilitate the proof thereof, and also to render dealings with land more simple and less expensive; therefore," etc. The most benevolent construction is to be adopted in construing the provisions of such an Act, as regards the effect they may have on the rights of persons owning or claiming land. There was plainly no intention to confiscate the right of any person claiming an interest in land without affording him an ample opportunity of enforcing his right.

Section 107 of the Act of 1885 provides that " any person claiming to be interested under any will, settlement, or trust deed, or any instrument of transfer or transmission, or under any unregistered instrument or otherwise howsoever, in any land, may lodge a caveat " to the effect that no disposition of the land be made until notice shall be served on the caveator or unless the disposition is subject to the claim of the caveator. The form of caveat given in the schedule shewed that the nature of the estate or interest claimed was to be set out in the caveat. By an amendment to the section passed in the following year, it was declared that a caveat should be deemed to have lapsed unless proceedings were taken upon it within a month, and that no caveat after having lapsed should be renewed without leave of the Court. Sub-section 10 of sec. 107 provided that it should not be lawful for the same person or for any one on his behalf " to lodge a further caveat, in relation to the same matter." The corresponding provision in the Australian Act from which the above Act is adopted is as follows:—"A caveat shall not

Digitized by Google

be renewed by or on behalf of the same person in respect of the same estate or interest."

It is clear that the Act of 1885, although forbidding the filing of a second caveat in relation to the same matter, permitted the filing of a further caveat to cover an after acquired interest. It is impossible to construe sec. 107 in any other way. If, for instance, a party possessed of an interest under a will filed his caveat to protect that interest, and during the pendency of the proceedings upon it he acquired a further interest under a trust deed or in any other way, it is surely the intention of the section to permit him to put in a further caveat to cover his additional interest. When the Interpretation Act declares that a word importing the singular number includes more than one thing of the same kind, it is impossible to construe "a caveat" as meaning "only one caveat" in sec. 107 of the first Act, or in the corresponding sec. 127 of the present Act; see Interpretation Act, R. S. M. 1902 ch. 89, sec. 8 (m).

The prohibition contained in sub-sec. 10 of sec. 107 of the Act of 1885, and continued in the subsequent Acts, in the words, "It shall not be lawful for the same person . . . to lodge a further caveat in relation to the same matter," must be taken to refer to the same subject matter, that is to say, the same question between the parties. The words employed in our Act are as wide or wider than "the same estate or interest," which is the expression used in the Australian Act.

Sections 127 and 140 of the present Act, R. S. M. 1902 ch. 148, contain the main provisions corresponding to the parts of the Act of 1885 above cited. Section 127 provides that "any person claiming an estate or interest in land described in an application to bring the same under the new system may . . . file . . . a caveat . . . forbidding the bringing of such land under the new system." By sec. 133, every caveat must state the nature of the title, estate, interest, or lien under which the claim is made. Section 140 provides that "after a caveat shall have lapsed or been withdrawn or discharged, it shall not be lawful, except as herein mentioned, for the same person or for any one on his behalf to lodge a further caveat or file a certificate of lis pendens in respect of any proceeding in Court in relation to the same matter." We need only look at the original provision, R. P. Act, 1885,

Digitized by Google

sec. 107, sub-sec. 10, above referred to, in order to see that the expression "in relation to the same matter" in the above cited sec. 140 applies to the word "caveat" as well as to the word "proceeding." The meaning of the sections plainly is that a second caveat shall not be filed while the first caveat stands, unless the second one relates to a different matter, that is to say, sets up a different mode of claiming title, or raises a different question between the parties. The interest a person takes under a tax sale deed has long been recognized under the Act as a special mode of claiming title, and special provisions have from time to time been made relating to tax titles: see Real Property Act, 1885, secs. 29 and 30, as amended by 49 Vict. ch. 28, secs. 7 and 8; also R. S. M. 1892 ch. 133, sec. 49, and 59 Vict. ch. 24, etc. The title or interest, therefore, which plaintiff acquired under the deed from the patentee of the lands in question is of quite a different nature from that taken under the tax deed, the latter depending for its validity upon the regularity of the tax sale and of the matters leading up to the same. To deprive him of the right to file a caveat in respect of the subsequently acquired title would partake of the nature of confiscation. This, I am satisfied, was never the intention of the Real Property Act, the object of which was, not to deprive a man of any right or interest he had in land, but to shew the title in a simple form and to facilitate dealings with the land. But, it was argued, plaintiff in this case should have abandoned his first caveat and have applied under sec. 140 for a Judge's order that a new caveat be filed, in which he might set up both methods of making title. I do not think that it was ever the intention of the Act that a man should abandon a valid proceeding upon one claim in order that he might take his chance of being allowed to add another and subsequently acquired claim.

Plaintiff was, in my view, entitled to file a caveat in respect of the title or interest he acquired under the deed from the patentee, without first obtaining a Judge's order giving him permission and without abandoning his first caveat.

In the view that has generally been taken of the effect of the decision in Frost v. Driver and of the dictum of the learned Judge in that case—that after a first caveat no further caveat can be filed under the authority of the section—plaintiff was justified in applying for a Judge's order. If

Digitized by Google

that dictum applies to the present case, plaintiff must either obtain a Judge's order permitting him to file the second caveat, or he must abandon any rights acquired under the deed from the patentee. As above pointed out, the decision in Frost v. Driver is not to be extended to a case like the present.

Plaintiff, therefore, although misled into applying for the order by reason of the generally received interpretation of the above case, is entitled without an order to file a caveat setting up his interest under the second deed. The other portion of the application, postponing the trial of the issue under the first caveat for a reasonable time so that the trial of the issues under both caveats may take place at the one time, should, I think, be allowed. If convenient, it would be well that both issues should be consolidated.

The costs of this appeal should be costs to plaintiff in any event; the costs of the application to Richards, J., should be part of the general costs of the issue under the second caveat.

---

## MANITOBA.

JUNE 9TH, 1905.

FULL COURT.

### BARRIE v. WRIGHT.

*Innkeeper—Liability for Guest's Luggage Lost or Stolen—Luggage not Directly Intrusted to Innkeeper for Safe Keeping—Carelessness of Guest—Contributory Negligence.*

County Court appeal. Plaintiff, on his arrival in Winnipeg, by train, delivered part of his luggage to a baggage transfer company with instructions to take it to defendants' hotel. Plaintiff then went to the same hotel, and registered as a guest and was given a bedroom, to which he took some other luggage, which he had, himself, carried from the train. Later, on the same day, the luggage which he had intrusted to the transfer company, was taken to the hotel by that company's driver and placed in the hotel hall, where the driver saw some other luggage standing. That part of the hall is not visible from the hotel office.

Digitized by Google

People going to and from the hotel bar passed the place where the luggage was so left. The hotel was crowded, owing to the influx of visitors to the Winnipeg exhibition, and the hall was not a safe place for unwatched luggage to be left in.

The driver who delivered it said that he went at once to the hotel clerk and told him that he had left it in the hall for plaintiff. That was disputed by the clerk. But the finding by the trial Judge in plaintiff's favour, necessarily implied that he believed the driver's story.

Neither defendants nor their servants paid any attention to the luggage, and it was left standing in the hall. Plaintiff saw it there about 11 o'clock on the night of the day of his arrival, but did not remove it, or draw the attention of the hotel servants to it. The next day he noticed that it was not in the hall. He did nothing on so noticing, or until the third day thereafter. On that day he asked for it. It could not be found. The presumption was that it had been stolen.

Plaintiff sued for the loss, and recovered judgment for $125. Defendants appealed.

The appeal was heard by RICHARDS and PERDUE, JJ.

H. Phillips, for defendants.

C. P. Wilson, for plaintiff.

RICHARDS, J.:—The main ground of appeal is that plaintiff was guilty of contributory negligence. The argument in support was based on plaintiff not removing his luggage, or asking to have it cared for, when he saw it in the hall on the night after his arrival, and not inquiring as to its whereabouts when he missed it the next day, or for three days thereafter.

The only one of these points that seems to me to be strongly arguable is the alleged negligence on the night following his arrival. It had probably been stolen before he missed it on the next day.

It has been held that a greater degree of care on the part of a guest, is necessary in a crowded hotel in a large city, than in one in a small town, and with few guests. That rule is applicable when the guest has had his goods put in

Digitized by Google

his bedroom, where he has taken control of them, or has otherwise taken possession of them, and then has carelessly dealt with them. But in the present case the goods had, I think, got into the custody of defendants when the driver who brought them reported to the hotel clerk that he had done so. If so, they never were taken out of defendants' custody. In such a case the rule seems to me to tell rather against than in favour of the hotel keeper.

With deference to the different view taken by my learned brother, I think that plaintiff was justified in assuming, when he saw his goods in the hall, that they were being cared for by defendants, and that, when he missed them on the next day, he was reasonable in supposing that they had been put into defendants' baggage room.

If the goods got, as I think they did, into defendants' custody, there seems to me no negligence on plaintiff's part in his merely acquiescing in defendants' acts with regard to them.

I would dismiss the appeal without costs.

PERDUE, J.:—The evidence is contradictory as to the main question in this case—the receipt of the parcels by the hotel-keepers. The County Court Judge has made a general finding in favour of plaintiff. Although a contrary conclusion might have been fairly drawn from the statements made, there is no such preponderance of evidence one way or the other as would justify a court of appeal in interfering with the finding of fact. We must therefore consider the question of the defendants' liability, assuming the state of facts alleged by plaintiff.

It appears that plaintiff arrived at Winnipeg on 23rd July last at about 4.30 p.m. He desired to go to the Brunswick hotel, which was kept by the defendants. He had two large parcels, in addition to a valise. He gave the parcels to the transfer company to be conveyed to the hotel, and he walked to the hotel, carrying his valise. He arrived at the hotel shortly before 5 o'clock, registered his name, and was given a room. The parcels were taken to the hotel by the transfer company about 6.30, and were placed in the main hall of the hotel. The transfer company's man states that

Digitized by Google

he called the attention of the hotel clerk to the parcels, but the clerk denies this.

After registering, plaintiff went out and did not return until about dark. He then changed his room, going in with a friend and moving his valise into the new room. He again went out and returned about 11.30. On this occasion he states that he saw his parcels in the hall. He did not, however, take them to his room or ask to have them placed in the baggage room. The next morning he noticed that they had been removed, but he made no inquiry as to what had become of them. On 27th July he, for the first time, asked for his parcels. A search was then made, but they could not be found. Plaintiff sued for the value of the goods lost, and a verdict was rendered in his favour for $125.

An innkeeper is, at common law, an insurer, and if the goods of a guest are, without any negligence on the part of the guest, lost at his inn, the innkeeper is liable for their value: per Byles, J., in Squire v. Wheeler, 16 L. T. N. S. 93, at p. 94; see also Beal on Bailments, p. 302 et seq.; Robins v. Gray, [1895] 2 Q. B. 504. The degree of care which a guest at an inn is bound to take in respect of his own property depends upon the surrounding circumstances. As remarked by Montague Smith, J., in Oppenheim v. White Lion Hotel Co., L. R. 6 C. P. 515, "what would be prudent in a small hotel in a small town might be the extreme of imprudence in a large city." The principle is laid down by Erle, J., in Cashill v. Wright, 6 E. & B. 890, as follows:—"An innkeeper is liable as for a breach of duty unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances." This principle is affirmed in a number of cases which are collected in Beal on Bailments, at p. 315.

In the present case it is clear that plaintiff did not bring with him the goods in question when he applied to be received as a guest at the hotel. They were brought to the hotel after he had registered and had gone out. No one at the hotel agreed to receive the goods and take charge of them for plaintiff. The messenger who brought them simply placed them in the hall, and, as he states, told the clerk there

Digitized by Google

were two parcels there for Barrie. The clerk said Barrie was not yet registered at the hotel, believing that to be the case. The parcels were left lying in the hall, where they were seen by the plaintiff, who did not ask to have them sent to his room or put in a safe place. The place where they were left was about 15 feet from the Main street door of the hotel. It was at a time when visitors were arriving to attend the exhibition, and many people were constantly passing through this hall to and from the bar-room and other parts of the hotel. It is inconceivable that a man who exercised ordinary care over his belongings would leave valuable property of his lying in such a position and not ask to have it put in a place of safety. The evidence shews that the proprietors of the hotel had made special provisions at the time for the receipt and custody of parcels. These consisted of a counter and shelves erected in the office which opened off the hall in which plaintiff's parcels had been left, and he could scarcely fail to see these preparations when he registered his name as a guest. When he saw his goods lying in such an exposed and dangerous position, he should have asked to have them put in the place provided for articles belonging to guests. "Where an opportunity of placing property under the care of the landlord or otherwise in safety, is given, but the customer neglects to avail himself of such opportunity, this constitutes such negligence as would exonerate the innkeeper in case of loss:" Jones v. Jackson, 29 L. T. N. S. 399, following Oppenheim v. White Lion Hotel Co., supra. When plaintiff saw his parcels lying in a hallway used by all the frequenters of the hotel and within a few feet of Main street, in the crowded condition in which it would be on a Saturday evening at that period, it was the height of negligence on his part not to call the attention of the hotel proprietors to them, or to take steps to have them removed to a safe place. Had he done so, the loss would not have occurred.

In my opinion, the appeal should be allowed and a verdict entered for the defendants.

[As the Judges on the appeal differed, the appeal was dismissed without costs, and the verdict for plaintiff affirmed.]

Digitized by Google

## MANITOBA.

JUNE 9TH, 1905.

FULL COURT.

## GILMOUR v. SIMON.

*Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Authority of Agent of Vendor — Scope of Authority—Statute of Frauds—Authority to Sign Name of Vendor.*

Action by purchaser for specific performance of an agreement for sale of land entered into on behalf of defendant, the alleged vendor, by Edward Egan, claiming to be defendant's agent for that purpose.

The agreement was in writing but the alleged authority to make it was oral. No one, other than Egan and defendant, was present when the agency was said to have been created. To prove the authority Egan was called as a witness. He was contradicted by defendant, who denied having given the authority.

The case was tried before PERDUE, J., who believed Egan's evidence to be substantially correct, and gave judgment for plaintiff.

Defendant appealed.

The appeal was heard by DUBUC, C.J., and RICHARDS, J.

C. W. Bradshaw and S. E. Richards, for defendant.

H. M. Howell, K.C., and G. D. Minty, for plaintiff.

DUBUC, C.J.:—The points raised in this appeal are: (1) whether Egan was authorized by defendant to enter into a binding agreement for sale of the property in question; (2) whether he made a sale to plaintiff within the scope of his authority; (3) whether there is a sufficient memorandum in writing to satisfy the Statute of Frauds.

The first point depends upon the evidence of Egan and of defendant. They make contradictory statements. According to Egan's evidence, he was authorized by defendant



Digitized by Google

to make the sale. Defendant denies giving him such authority. The trial Judge says he attached no credibility to defendant's testimony; and, relying on Egan's evidence, he finds that he was authorized to make the sale.

The whole question turns on what was the extent of the authority given by Simon to Egan; whether he was authorized to make a binding contract of sale, or only to find a purchaser and negotiate a sale.

Egan had only an oral authority from defendant. He says that he asked Simon if he would take $40 an acre for the land, and that Simon answered: "Yes, if I get a good cash payment." And it was arranged between them that $1,000 would be a good cash payment. This was on 3rd December, 1903, and Egan says that Simon gave him the exclusive right of sale until the following Monday, 7th December. He made the sale to Gilmour on the 5th, signed, as agent for Simon, a receipt embodying the terms of the sale, which receipt was drawn by Gilmour, and is the agreement sought to be specifically performed in this action. At the same time, he got from Gilmour a cheque for $50, given as a deposit and made to his own order. On the evening of the same day, he went to see Simon, told him he had made a sale, and placed before him the $50 cheque, and a copy of the receipt given to Gilmour. He states that, on seeing the receipt, Simon said: "I don't want to sell that way." In this he agrees partly at least with Simon's version of what took place. On being asked what he said on that occasion, Simon's answer was: "I said I never gave him authority to sign my name or sell my land, and you have the cheek to sign my name." There is only a shade of difference between the two statements: Egan does not explain what Simon meant by not wanting the sale that way, and Simon gave the explanation. What transpired at that moment and subsequently between them shews that Simon objected to Egan entering into a binding contract for him, and to some of the terms of the agreement. At that same interview, at Egan's request, Simon gave him a description of the land, being lot 15, St. Vital, and stating the price to be $4,270. The paper was written by Simon, but was not signed. Egan states that Simon always wanted $4,270 for the lot, that is, $40 per acre for about 106.63 acres, saying that he had paid for that number of acres. But it appears that the lot contains only 104 acres. The cheque and copy of the receipt were left with Simon on that evening, but were returned to Egan on Monday morning.

Digitized by Google

Those are the material facts of the case. On that evidence, should it be held that Egan was authorized to make a contract of sale binding on Simon? The authorities are clear on the point that an agent authorized to find a purchaser and negotiate a sale has no authority to make a binding contract of sale. That was held in Warner v. Sharpe, L. R. 19 Eq. 108, and in Wilde v. Watson, 1 L. R. Ir. 452. In these two cases the authority given to the agent was in writing, and the Court had more facility to arrive at a satisfactory conclusion. Hall, V.-C., said in Warner v. Sharpe: "I state my opinion to be, that when instructions are given to an agent to find a purchaser of landed property, he, not being instructed as to the conditions to be inserted in the contract as to title, is not authorized to sign a contract on the part of the vendor." That decision was approved and adopted in Wilde v. Watson. and the Vice-Chancellor adds the following remarks: "It is a common practice to place houses or estates on the books of numbers of these agents at the same time, and if each had authority to conclude a contract for the owner, the result would be, that he might become bound to let or sell the same premises to different parties at the same instant."

In Prior v. Moore, 3 Times L. R. 624, and in Chadburn v. Moore, 61 L. J. Ch. 674, the authority of the agent was verbal, as here. In the first of these cases, the owner of the premises instructed one Reynolds, an estate agent, to place the property on his books as for sale, stating the lowest price to be £1,600. The agent signed on her behalf a contract to sell the property to the plaintiff. It was held that an agent appointed to sell land has, in the absence of express instructions, no authority to sign a contract for sale on behalf of his principal. In Chadburn v. Moore, Kekewich, L.J., said: "Here, the circumstance must not be forgotten that Moore, on the second occasion, told Newman what he was prepared to take for the 29 houses. Newman thus jumped at the conclusion that he had power at that price to enter into a contract. That is, in my opinion, not sufficient, and unless express authority is given to the agent to sell, and for that purpose to enter into a binding contract, the principal reserves his final right to accept or refuse." This seems to me to be in point and applicable to this case. Egan admits that he was not instructed as to the title, and that he had no special instructions to enter into a binding contract.

Digitized by Google

It was argued on behalf of plaintiff that a different conclusion was arrived at in Rosenbaum v. Belson, [1900] 2 Ch. 267. The Judge there refers to Warner v. Sharpe, Chadburn v. Moore, and Prior v. Moore, but does not pretend to overrule those cases. The authority in that case was in writing, as follows: "Please sell for me my houses, and I agree to pay you a commission on the purchase price accepted." This is an express authorization to sell, and the learned Judge held that the agent was authorized to make a binding contract and sign an agreement for sale. Quite different is the present case, where the authority is verbal and rests solely on the testimony of Egan. Can this be held sufficient, even if Simon's evidence is not considered at all? Egan does not pretend that Simon gave him express instructions as regards the title of the property, or as to receiving money for him, or as to signing any agreement on his behalf. He admits that Simon, on the agreement being shewn to him, immediately protested against the assumed authority of Egan to sign his name, and repudiated the sale. He admits also that he had made previous sales for Simon, and that, on those other occasions, Simon was in the habit of closing the sales himself; that he, Egan, had never before signed any agreement for sale in Simon's name; and that he had never received any money for him on such sales. This goes to shew that Simon, unless he had given special or express instructions to the contrary, had a right to expect that Egan would not, on this occasion, take upon himself to sign his name and collect money for him. And Egan states that Simon did not give him such special or express instructions. The inference to be drawn from these different circumstances is that this was merely the ordinary case of an owner putting his property in the hands of an agent to negotiate a sale for him; the agent in such a case is only authorized to find a purchaser who would accept the vendor's terms, and to bring him to the owner, he has no authority to sign a binding agreement in the owner's name. And the case with these features comes within the principles adopted in Prior v. Moore and Chadburn v. Moore, and other cases. To hold that an agent, having only a verbal authority, the proof of which rests entirely on his own uncorroborated testimony, can enter into a binding contract for the sale of a valuable property, sign his principal's name, and collect money for him, without any express

Digitized by Google

instructions to do so, would, in my opinion, be laying down a dangerous doctrine, opening the door to many abuses and serious consequences. An agent may, of course, be empowered by verbal authority to enter into binding contracts for his principal; but the authority must be positive, unequivocal, and clearly established. In the present case, Egan does not state that he had express instructions to sign a binding agreement; but he says that because he had the exclusive right to make the sale until the following Monday, he believed that he had the right to enter into a binding contract, and sign Simon's name. This does not shew a positive, unequivocal, or clearly established authority.

Another point raised is that the receipt signed by Egan shews that the sale made to Gilmour was for $50 cash paid as a deposit, and $950 to be paid on acceptance of title, instead of the $1,000 cash payment asked by Simon. The term "on acceptance of title" is somewhat vague, as the purchaser might quibble on frivolous grounds as to the sufficiency of the title, and then deprive the vendor for a more or less extended period of the cash payment he would be entitled to receive. This was a term on which Egan admits he had no instructions at all from Simon. It is true that at the trial, Gilmour said that he was willing to accept the agreement for sale held by Simon; but there is nothing to shew that he expressed such willingness at the time that the agreement was entered into; and the fact that such term was embodied in the agreement, which was drawn by Gilmour himself, shews that he wanted to take time to investigate the title, and that he would pay the $950 only when he would consider the title acceptable to him. Egan must, I think, be held to have exceeded his authority in agreeing to such terms with Gilmour.

On the above grounds, I do not think that the Court should decree specific performance of the agreement in question, as prayed for in the statement of claim. Some other points were raised, but I do not consider it necessary to discuss them.

I think the appeal should be allowed with costs.

RICHARDS, J., gave reasons in writing for the same conclusion.

Digitized by Google

## MANITOBA.

JUNE 9TH, 1905.

FULL COURT.

### McLENAGHAN v. HOOD.

*New Trial—Surprise—Affidavits—Loss of Cattle—Bailment —Cause of Disease not Assigned in Pleading or Preliminary Examination.*

By the statement of claim plaintiff alleged (2) that on 5th October, 1903, he and defendant entered into an agreement in writing, whereby defendant agreed to winter 47 head of young cattle belonging to plaintiff throughout the winter of 1903-1904; (5) that defendant failed to carry out the provisions of the agreement, and by reason thereof 29 of plaintiff's cattle died while under the care of defendant, and were lost to plaintiff, and the remainder of the cattle were improperly provided with food and shelter and otherwise improperly cared for, and plaintiff thereby suffered damage.

The agreement produced at the trial provided that defendant should "feed, salt, and winter the cattle for $4.50 per head." It was also agreed that defendant should be responsible for the loss of any of the cattle "through getting lost or killed or any other way except dying from ordinary disease."

The statement of claim contained no direct allegation of negligence on the part of defendant, nor anything that could be construed as a charge of negligence, except what was contained in the latter part of the 5th paragraph, and that was confined to the 18 cattle which survived.

The case made out by plaintiff at the trial before RICHARDS, J., and on which he obtained a verdict (25 C. L. T. Occ. N. 19), was that the stable provided for the cattle was so small that they were overcrowded at night and overheated, and that the disease, whatever it was, from which so many died, was to be attributed to that cause.

Defendant appealed against the decision of RICHARDS, J.

H. M. Howell, K.C., for plaintiff.

A. Meighen and R. W. McClure, for defendant.

Digitized by Google

The judgment of the Court (DUBUC, C.J., PERDUE, J.), was delivered by

PERDUE, J.:—The defendant applies for a new trial on the ground of surprise in the evidence produced by plaintiff as to the size of the stable. Defendant's solicitor states upon affidavit that it was impossible to ascertain from the statement of claim upon what grounds plaintiff was proceeding; that plaintiff was examined upon the statement of claim, and defendant was unable from such examination to ascertain the grounds upon which plaintiff held him liable.

The evidence as to the size of the stable was contradictory and very unsatisfactory, none of the witnesses having made an actual measurement of it. The stable was a temporary one, and it had been pulled down before the action was commenced. Several affidavits have been filed upon the motion for a new trial, and from these it would appear that the space covered by the building is well marked and ascertainable, and the actual measurements made on the site shew, according to the allegations in the affidavits, that the stable was much larger than plaintiff's witnesses declared it to have been. The affidavits also state that a stable of the dimensions shewn by the measurement of the site would be sufficient to accommodate the cattle received by defendant from plaintiff. If the evidence contained in the affidavits had been adduced at the trial, there is good reason to believe that it would have met and outweighed the evidence produced by plaintiff.

As to the question of surprise, there is nothing in the statement of claim or in plaintiff's examination to shew that he was suing defendant for improperly putting the cattle in a stable too small to accommodate them, which treatment caused the losses complained of.

We think there should be a new trial, the costs of the former trial and of this appeal to abide the event of the new trial.

Digitized by Google

## MANITOBA.

JUNE 9TH, 1905.

FULL COURT.

### MASSEY-HARRIS CO. v. MOLLOND.

*Execution—Proceeds of Sale Stolen from Sheriff's Bailiff—Responsibility—Satisfaction of Judgment — Advertisement of Sale—Bailiff Advertising as Auctioneer for Executors of Execution Debtor—Question whether Sale under Execution.*

In January, 1900, plaintiffs recovered a judgment against defendant for $436.98, and issued to the sheriff of the central judicial district a fi. fa. against defendant's goods. The same sheriff also received a fi. fa. against defendant's goods at suit of B. R. Hamilton & Co.

The sheriff issued to one Adams, of Neepawa, his warrants to realize under the writs of fi. fa. as the sheriff's bailiff.

Defendant died, and his executors decided to sell his chattels by auction, and employed Adams, who was an auctioneer, to conduct the sale. Adams advertised the sale as being by order of the executors, to be held 5th April, 1901. Some of the chattels were under mortgages from defendant to a trustee for the Union Bank of Canada.

Messrs. Davis & Fieldhouse, of Neepawa, were solicitors for the executors and also for the bank.

It was arranged that Mr. Fieldhouse should act as clerk for the executors at the sale and receive the purchase money, or the approved notes that the advertisement stated might be given in lieu of money. On the way to the place of sale Adams told Fieldhouse that he intended to seize under the writs of fi. fa. On arriving at the place of sale, Adams seized under the writs and notified Fieldhouse and the executors of the seizure.

A sale was held by him at the time that he had, on behalf of the executors, advertised that their sale would be held. Some of the chattels were paid for in cash and others by approved notes given by the buyers and made payable to the executors. At once after the sale, Fieldhouse delivered all

Digitized by Google

the money and notes so received to Adams, who took them away with him.

Shortly thereafter, Mr. Davis, on behalf of the bank, notified Adams of the bank's claim under the mortgages, and an understanding was had between them that Adams should retain the moneys and the proceeds of the notes until the bank should be paid off with other moneys which Davis knew the executors expected to receive and pay to the bank.

Adams collected the notes. He did not place the moneys received at the sale or from payment of the notes in a bank, but retained them in an ordinary cash box in his office. They were subsequently stolen by a person who knew the office and was apparently often employed by or worked with Adams in the office.

The executors from time to time paid moneys to the bank, the payment which finally settled their claim being made after the above theft from Adams's cash box had happened. Afterwards the executors paid directly to the sheriff $111.45, which sum was, together with the proceeds of the sale, enough to satisfy the executions in the Hamilton case and this case.

Adams did not pay the sheriff anything on account of the proceeds of the sale. The sheriff paid nothing to plaintiffs. He took the position that he was not bound to account for more than the $111.45 he received directly from the executors. He had made a return that he had the $111.45 on hand and was ready to account for it, and that there were no goods out of which he could make the residue under the fi. fa.

The executors tendered a satisfaction piece for signature. That was refused, and they applied for an order dispensing with the signature. The sheriff and the plaintiffs opposed the motion.

RICHARDS, J., held that the judgment was discharged by the seizure and sale to the extent of the amount realized and applicable to the fi. fa., and that it had since been discharged in full by the payment made directly to the sheriff.

The order made was to dispense with the signature of the satisfaction piece; satisfaction to be entered. The executors' costs of the motion and of entering satisfaction to be paid by plaintiffs and the sheriff: 24 C. L. T. Occ. N. 377.

The plaintiffs and the sheriff appealed.

J. A. M. Aikins, K.C., and J. B. Hugg, for plaintiffs.

C. P. Wilson, for executors.

Digitized by Google

The judgment of the Court (DUBUC, C.J., PERDUE, J.), was delivered by

DUBUC, C.J.:—The point to be determined is whether T. E. Adams sold the goods in question, and received the proceeds thereof, as sheriff's bailiff, under the writ of execution placed in his hands, or as auctioneer for the executors of the defendant Mollond. He had advertised the sale under instructions from the executors, but on the day of the sale he seized the goods under a fi. fa. The amount realized was received by him partly in cash and partly in notes. The notes were made payable to the executors, but were left in his hands for collection, and he collected them. Adams did not remit to the sheriff the moneys received as proceeds of the sale; but he kept them in a cash box in his office for about two years. It was on 5th April, 1901, that the sale took place; and in September, 1902, a portion of the money kept in the cash box was stolen. The Union Bank had a chattel mortgage on most of the goods sold, but the executors paid the bank. They also paid directly to the sheriff the sum of $111.45, which sum with the amount realized by the sale, was sufficient to satisfy plaintiffs' executions, and also another execution at the suit of B. R. Hamilton & Co. against defendant, which the sheriff had in his hands at the time.

The dispute is about the amount stolen: Adams states he sold the goods and received the proceeds as auctioneer for the executors; while the executors, and their solicitors, contend that the goods, having been seized before the sale, were sold under the fi. fa.

It is contended that the bailiff could not sell under the executions because he had not given the 8 days' notice required by sec. 21 of the Executions Act, and that, therefore, Adams must have made the sale as auctioneer for the executors. In the first place, I think that the provision about the 8 days' notice is only directory, and that the sale should not be held invalid because the bailiff may not have literally complied with it, if it was found that there was otherwise a sufficient notice to insure a successful public sale. In the second place, the bailiff had already advertised a sale of the goods by auction on that day; and, as held by my brother Richards, the sale had all the more chance to be made on favourable terms by its being known to the intending buyers to be a voluntary sale rather than a forced sale under executions. Then, if the proceeds of the sale were sufficient, as

Digitized by Google

in this case, to satisfy the executions, plaintiffs have no reason to complain of the insufficiency of the notice. If it were found that the goods had been sacrificed, or sold below their value, and that, with a special notice of the sale under the fi. fa., the amount would have been realized with a smaller quantity of the goods, that might be a ground of complaint available to defendant, but not to plaintiffs. But nothing of the kind occurred here. Nobody complains that the goods were not sold for the best price that could be obtained. The sheriff is plaintiffs' agent for the purpose of the execution, and the bailiff is an employee of the sheriff, for whose acts the sheriff is responsible. If the bailiff has failed to do his duty in that respect, neither plaintiffs nor the sheriff can invoke his omission for having the sale declared void, particularly when no damage of any kind has resulted from such omission.

Another ground urged to have the sale declared invalid is that, there being a chattel mortgage on the goods, the bailiff could only sell the equity of redemption, and not the goods themselves. The chattel mortgage was collateral to certain notes due by the estate to the bank, and the notes were subsequently paid by the executors; thus the whole proceeds of the sale were eventually available to satisfy the judgment. But, besides this feature of the extinction of the chattel mortgage, the bank was represented at the seizure and the sale by F. L. Davis, its solicitor, who was present and stood by while the goods were sold; and immediately after the sale, Davis informed the bailiff of the chattel mortgage held by the bank. The bank alone, as mortgagee, could object to the sale of the goods themselves, instead of only the equity of redemption, but no objection was raised on its behalf.

It is also contended that a sheriff's sale under execution must be for ready money. This is a general, but not an absolute, rule. If the sheriff does not comply with the rule, he would be held responsible for the money in case he failed to collect it; but that cannot have the effect of rendering the sale invalid, and, in this case, the notes taken were all paid. This is also submitted as a ground for the contention that Adams, in taking notes payable to the executors, should be held to have made the sale as auctioneer for the executors, and not as bailiff under the fi. fa. We have in evidence that the notes were not kept by the executors as belonging to them,

Digitized by Google

but that they were kept in the bailiff's hands; that he collected the amounts due on the notes, and kept the moneys.

It is also contended that the sheriff, after realizing under the execution, should have, as required by sec. 25 of the Executions Act, advertised the amount realized, and kept the money for three months for ratable distribution among the persons having unsatisfied executions in his hands. Here again, if the sheriff's bailiff has been guilty of dereliction of duty, the defendant should not be held responsible for it; and, moreover, as the motion to enter satisfaction was made in February, 1904, nearly 3 years after the seizure and sale, and as there is no evidence that any other execution against defendant's estate has been placed in the sheriff's hands, I do not see how the contention can be sustained.

Adams admits that he made the seizure. Tindall and Benson both state that they were present at the sale; that before the sale Adams notified them that he had made the seizure, and that they, as executors, were to govern themselves accordingly; that he made an inventory of the goods seized, as provided in sec. 21 of the Executions Act, and handed it to Benson; and Benson has produced it on this motion. Having done that, Adams proceeded to sell the goods. The bank's solicitor, as well as the executors, were present, nobody objected to the seizure, and all seemed to assent, impliedly at least, to the sale under the seizure. Having seized the goods in execution, the sale which took place subsequently must have been made under the execution, unless he had abandoned the seizure; and there is nothing to shew such abandonment, or even any intention to abandon. He had been instructed to sell the goods as auctioneer for the executors. But by seizing the goods under the fi. fa., he took possession of them in his capacity of bailiff, and having them in his possession as such, he sold them. Supposing the auctioneer and the bailiff had been two different persons, and the auctioneer had first been placed in possession of the goods, the bailiff on coming there and seizing the goods, would immediately have got the legal possession thereof; the auctioneer's possession would cease, and he would have nothing more to do with them. Then, the auctioneer could not have sold the goods, unless there had been an express abandonment of the seizure by the bailiff, and a repossession of them by the auctioneer. In the absence of any evidence to that effect, the Court cannot presume here

Digitized by Google

an abandonment by Adams the bailiff, and a re-delivery by him to Adams the auctioneer.

From the above it follows that the goods and chattels seized by Adams under the execution were sold by him as bailiff; that the proceeds of the sale were held by him as bailiff; that the amount realized being sufficient to satisfy the judgment, the defendant, or his executors, are entitled to have satisfaction of the judgment entered; that the order of my brother Richards be affirmed, and that the appeal should be dismissed with costs.

---

## MANITOBA.

JUNE 9TH, 1905.

FULL COURT.

### McGREGOR v. WITHERS.

*Equitable Execution—Judgment Debtor's Interest in Land—King's Bench Act, Rule 743—Sale under Registered Certificate of County Court Judgment—Cancellation of Agreement for Sale — Consideration—Cross-payments—Assignment of Agreement for Sale—County Courts Act.*

This was an action to enforce a registered certificate of a judgment for $160.25 recovered in the County Court of Glenboro. The defendant Houghton had entered into an agreement with the Trust and Loan Company of Canada to purchase the land in question, and almost immediately thereafter agreed to sell the land to the defendant Withers at a small advance and on terms different from those contained in his agreement with the loan company. The principal feature of importance in the agreement between Houghton and Withers was that at least 100 acres of the land should be cropped with wheat in each year, and Withers was to deliver one-half of the grain from each crop to Houghton, who was to sell it and apply the proceeds in reduction of principal and interest. There was no provision in the agreement allowing Withers to pay the purchase money in cash, or in any other way than by the delivery of the grain. The agreement contained clauses providing that Withers should cut all noxious weeds and farm the lands in a husbandlike

Digitized by Google

manner; also, that he should break 20 acres of land in each year, insure the wheat against hail, etc. It was further provided that until the completion of the purchase the legal relationship of landlord and tenant should subsist between the vendor and vendee. In case of default by the purchaser in the performance of any of the covenants, the vendor had the right, with or without notice, to cancel the contract and declare it void. The declaration of cancellation might be made by notice to the purchaser, addressed to him at Baldur post office.

The judgment upon which the suit was brought was in force, and a certificate of the same was registered against Withers, at the time he entered into the agreement. Proceedings were taken by the plaintiff before the local Judge at Brandon under Rule 743 of the King's Bench Act, to sell the land, and while these were pending Houghton served notice on Withers that the agreement was cancelled. This action was then brought to have it declared that the alleged cancellation was void, and that the plaintiff was entitled to redeem Houghton, for an order for sale, and, in the alternative, for a marshalling of Houghton's securities, in case Withers was entitled to an exemption in part of the lands.

The case was tried before RICHARDS, J., who entered judgment for defendants: 24 C. L. T. Occ. N. 252.

Plaintiff appealed.

C. P. Wilson and J. F. Kilgour, for plaintiff.

H. M. Howell, K.C., and G. R. Coldwell, K.C., for defendant Houghton.

The judgment of the Court (DUBUC, C.J., PERDUE, J.), was delivered by

PERDUE, J.:—Much of the argument was directed towards the question of whether the agreement between the two defendants was assignable or not. This, however, would appear to be only of secondary importance, and the main point to be considered in the case is the effect of the registered certificate of judgment as against Withers's interest in the land. The provisions for registering County Court certificates of judgments and declaring the effect thereof are found in secs. 213-215 of the County Courts Act, R. S. M. 1902 ch. 38. By sec. 213 it is declared that the registration of a

Digitized by Google

certificate of judgment "shall bind all interest or estate of the defendant or defendants in lands and hereditaments situate within the registration district . . . the same as though the defendant or defendants had, in writing, under his or their hand or hands and seal or seals, charged the said lands and hereditaments with the amount of the said judgment."

The expression "interest or estate" in the above section is much narrower than that used in the Judgments Act, R. S. M. 1902 ch. 91, relating to King's Bench judgments. By the latter Act it is declared that the registration shall form a lien or charge on the lands of the judgment debtor, and the interpretation clause declares land or lands to include "all real property and every estate, right, title, and interest in land or real property, both legal and equitable and of what nature and kind soever, and any contingent executory or future interest therein, and a possibility coupled with an interest in such land or real property, whether the object of the gift or limitation of such interest or possibility be ascertained or not, and also a right of entry, whether immediate or future, and whether vested or contingent, into or upon land. The provisions of the Judgments Act relate only to judgments or orders of the Court of King's Bench.

The difference in effect between a registered County Court judgment and a registered King's Bench judgment appears to have existed since the establishment of these Courts. The provision relating to the former contained in C. S. M. ch. 41, sec. 116, is in the same words as those cited from sec. 213 of the present County Courts Act. On the other hand, a writ of fieri facias against lands, while such writs existed, or a registered judgment in the higher Court, had the same binding effect against the debtor's lands by the provisions of the C. S. M. as a registered judgment has at present: see C. S. M. ch. 37, sec. 83.

In Ontario, the former provisions declaring what should be saleable under a fi. fa. lands are similar in effect to those above cited from the Manitoba Judgments Act: see C. S. U. C. 1859 ch. 90, secs. 5, 11. Yet, Mr. Leith lays it down that under these provisions a right of purchase cannot be sold under a fi. fa. lands: see Leith's Real Prop. Statutes, p. 314. Subsequent amendments have extended the effect of the writ in Ontario. In Bank of Montreal v. Condon, 11 Man. L. R. 366, Taylor, C.J., held that the interest of a vendor who had entered into an agreement to sell land, was

Digitized by Google

not bound by a registered certificate of judgment, following Parke v. Riley, 3 E. & A. 215.

It is unnecessary to consider whether the interest of the defendant Withers could have been sold under the wider provisions contained in the Judgments Act. The question to be considered is, what is the nature of the estate or interest, if any, which he has in the land which may be bound by the plaintiff's registered County Court judgment? If the expression used in the County Courts Act is to be construed as covering everything covered by the much fuller and wider provision contained in the Judgments Act, then the careful enumeration in the latter Act of the various estates and interests, present, executory or future, legal or equitable, vested or contingent, was superfluous. It rather appears that the legislature intended that a judgment of the higher Court should, when registered, bind all interests of the debtor in real estate in as full a manner as possible, although some interests may have been overlooked and have escaped enumeration. There was not, apparently, an intention on the part of the legislature to give the same drastic effect to a registered judgment in the inferior Court.

Applying the expression used in the County Courts Act to the present case, what was the "interest or estate" which Withers took under the agreement, and which he must be regarded as having charged in writing under his hand and seal with the amount of the debt? The expression certainly does not cover an assignment of the contract or of the covenants contained in it. Nor does it cover the future or expectant interest or estate which Withers may have expected to acquire by reason of anything thereafter to be done by him in pursuance of the agreements or covenants. He had, no doubt, some present interest in the land as distinguished from the future or contingent interest. He had a right of possession, and, if he continued to cultivate the land and perform the conditions of the contract, he would eventually be entitled to an absolute estate. But to execute a bare charge on the land would only affect his present interest, whatever that is, and would not assign the benefit of the contract, or operate by way of estoppel so as to convey the after acquired estate.

Prior to the commencement of this action the defendant Houghton, as he contends, cancelled the agreement by service of notice on Withers for non-payment of purchase money and non-performance of covenants. According to the evi-

Digitized by Google

dence, there seems to have been default on the part of Withers in carrying out the terms of the agreement. The plaintiff claims that he, as holder of a registered judgment, was entitled to notice of this cancellation. The agreement, however, provides that the declaration making the contract null and void may be made by notice to the purchaser. This is not a notice calling upon him to do anything, but a declaration that the agreement has been forfeited or declared null and void. As the judgment creditor cannot be regarded as an assignee of the agreement, he is not entitled to notice, and, in any event, notice to Withers seems to be all that is required under the provisions of the cancellation.

It was also contended by plaintiff that the provisions for terminating the agreement upon default, were of the nature of a forfeiture, the same penalty being meted out for a trifling default as for a serious one. Re Dagenham Dock Co., L. R. 8 Ch. 1022, and Hudson's Bay Co. v. McDonald, 4 Man. L. R. 480, were relied on in support of this proposition. It was argued that a court of equity would relieve against such a forfeiture. If the default on Withers's part included, as Houghton states, failure to fulfil the conditions as to cropping and failure to do the breaking of the land as agreed, it might be questionable whether the Court would, on the evidence offered in this case, relieve, and if it decided to do so upon what terms it would grant the relief. But plaintiff is not an assignee of the agreement or entitled to perform it. He cannot, therefore, claim relief against the alleged forfeiture. The only person who can claim such a remedy is Withers, and he appears to have concurred in or accepted the cancellation of the agreement.

The County Court judgment was in existence and the certificate registered against Withers before and at the time the agreement was entered into. There can be no contention that it charged when registered an existing interest in him. It is sought to charge with the judgment his after acquired interest and this at the expense of Houghton, who had innocently entered into an agreement to sell land, on deferred payments and on crop conditions, to a man then actually burdened with a judgment. In this aspect of the case, the merits can scarcely be said to be with plaintiff.

There were some other points raised in the case with which it does not seem necessary to deal.

The appeal should be dismissed with costs.



Digitized by Google

## MANITOBA.

JUNE 9TH, 1905.

FULL COURT.

### PRIMEAU v. MOUCHELIN.

### PRIMEAU v. PANTEL.

*Promissory Notes—Consideration—Sale of Animals—Defective Title of Vendor—Approbation of Contract of Sale after Discovery of Defect in Title.*

County Court appeal. Plaintiff was the widow of J. B. Mouchelin, who died in 1900, leaving a will, of the material parts of which the following is a translation:—

"1. I wish that after my death my wife shall enjoy the profit of my land, of my animals, and of all that which belongs to me, as long as she shall live."

"3. That after the death of my wife all the animals which belong to her be divided equally amongst all my children."

Plaintiff took possession of the cattle after her husband's death, and sold some of them to defendant Mouchelin, who was her son, and some to defendant Pantel, her son-in-law.

Defendants gave plaintiff their promissory notes for the price of the cattle bought by them respectively, and took and kept the cattle.

When so selling plaintiff asserted and apparently believed, that the cattle were hers absolutely. Defendants apparently thought that the deceased had died intestate, and erroneously supposed that his so doing gave plaintiff an absolute title to the cattle.

After purchasing the cattle and giving their notes, defendants learned of the will. Thereafter they paid a year's interest on the notes. They did not return or offer to return the cattle. Until sued they apparently did not dispute plaintiff's right to sell.

These actions were commenced on the notes after they became due, and the trial Judge gave judgments for defendants, who defended on the ground that plaintiff had misrepresented her title.

Plaintiff appealed.

H. M. Howell, K.C., for plaintiff.

C. P. Wilson and A. J. H. Dubuc, for defendants.

Digitized by Google

The judgment of the Court (RICHARDS and PERDUE, JJ.), was delivered by

RICHARDS, J.:—It seems to me unnecessary to construe the will. The plaintiff was, at least, able to give a title to the cattle for her life, so that there was not a total failure of consideration. There was no fraud. The defendants, on learning the contents of the will, were, I think, bound to repudiate at once if they meant to assert that they had received less than they had bargained for. Instead of so doing, they retained the cattle and paid interest on the notes. It seems to me that they thereby with knowledge of the facts elected to affirm their purchases.

The dispute notes, in addition to pleading failure of consideration, which has been disproved, set up special defences which, apparently, are meant to allege fraud and breach of warranty of title. No fraud is shewn, and defendants have not been disturbed in either title or possession.

With deference, it seems to me that the trial Judge should have found for plaintiff in each case, for the full amount of the note, with interest from the end of the first year after the notes were made.

I think that, in each case, the appeal should be allowed with costs, the judgment entered in the County Court set aside, and judgment entered for plaintiff for the amount of the note with interest from 25th September, 1901, with costs.

---

## MANITOBA.

JUNE 9TH, 1905.

FULL COURT.

### CASS v. McCUTCHEON.

*Parties—Action to Enforce Contract and for Breach—Addition of Company as Co-plaintiff—Company not in Existence when Contract Made—Principal or Cestui que Trust—Claim on Behalf of —Pleading—Amendment.*

Appeal by defendant from order of PERDUE, J., allowing plaintiff to amend his statement of claim.

F. H. Phippen and G. D. Minty, for plaintiff.

J. A. M. Aikins, K.C., for defendant.

Digitized by Google

The judgment by the Court (DUBUC, C.J., RICHARDS, J.), was delivered by

DUBUC, C.J.:—The object of the amendments sought to be inserted in the statement of claim is to allow the Manitoba Construction Co. to have the benefit of the agreement made between plaintiff and defendant and to claim damages with him for the breach of the contract.

In his action the plaintiff asked for an injunction to restrain defendant from committing a breach of the contract made between them, for specific performance of the contract, and for damages sustained by him by reason of the breach.

An interim injunction was granted, but it was afterwards dissolved by the full Court: 14 Man. L. R. 458; 23 C. L. T. Occ. 249.

The judgment was delivered by the then Chief Justice Killam, in which he says:—"It does not appear that these (brick contracts) were made for the benefit or on behalf of the (Manitoba Construction) Company, or that the company has acquired any interest or incurred any liability in respect of them."

The plaintiff then applied before the Referee for leave to amend the statement of claim by adding the Manitoba Construction Co. as co-plaintiffs, and his application was granted, but the order of the Referee was afterwards reversed, on appeal by Mr. Justice Richards, who held that, whatever the company's rights to the contract may be as between it and the plaintiff, there is no contract of any kind as between the company and the defendant, and the company's interest, if any, in the contract, cannot in any way affect the defendant.

Then the plaintiff applied for and obtained the order now appealed from allowing amendments to the statement of claim, the effect of which is practically to allow the plaintiff to claim damages for breach of contract for himself as trustee and for the Manitoba Construction Co. as cestuis que trust.

It is contended on behalf of defendant that in plaintiff's agreement he acted in the capacity of agent for the Manitoba Construction Co. and not as trustee for the company.

It is a well known doctrine that a contract entered into by an agent for a company not yet formed or for a principal not in existence at the time of the making of the contract, cannot be binding on the company or principal, and that such a contract cannot be adopted or ratified by the company or principal when either of them comes into existence: Kelner v. Baxter, L. R. 2 C. P. 175; In re Empress Engineering Co., 16 Ch. D. 125; In re Northumberland Avenue Hotel Co., 33 Ch. D. 16; North Sydney Investment Co. v. Higgins, [1899]

Digitized by Google

A. C. 263; Bagot Pneumatic Tyre Co. v. Clipper Tyre Co., [1901] 1 Ch. 196; Natal Land Co. v. Paulin Syndicate, [1904] A. C. 120. Erle, C.J., said in Kelner v. Baxter: "There must be two parties to a contract, and the rights and obligations which it creates cannot be transferred by one of them to a third person who could not be bound by it at the time it was made." There cannot be any dispute as to that proposition.

The plaintiff, on the other hand, argues that he must be considered to have contracted with the defendant as a trustee for the Manitoba Construction Co., which he was then intending to form, and that a trustee can enter into a valid contract for a cestui que trust not in existence at the time of the making of the contract, such for instance as a trust created in favour of an unborn child.

There is no doubt that in an action based on a trust, brought by the trustee, the beneficiaries or cestuis que trust may join as co-plaintiffs in the suit, but they are not necessary parties to it; the Court or Judge may, however, at any stage of the proceedings order any of such persons to be made parties to the action, either in addition to or in lieu of the previously existing parties thereto: K. B. Act, Rule 227; Annual Pr. 1905, p. 158; Re Bawden, 45 Ch. D. 444.

It is not a question here of making the Manitoba Construction Co. parties to this action; that point has been settled by Mr. Justice Richards's order.

The point to be determined seems to be, whether, in entering into the agreement in question with the defendant, the plaintiff should be considered to have acted as agent for the Manitoba Construction Co. or in the capacity of trustee for the company. If he was merely an agent, the company can have no right whatever against the defendant under the agreement. If he is held to have acted as trustee, can the company come in as beneficiaries and claim damages against the defendant for breach of the contract?

Taking the contract as it is, even if the plaintiff might be considered as having at the outset intended to be a trustee for the future company, it seems to me very doubtful whether the company, after coming into existence, could claim against the defendant the benefit of such contract, or damages for the breach thereof. In the first place it has already been held by the full Court that the company does not appear to have acquired any interest or incurred any liability in respect of the alleged brick contracts entered into by the plaintiff and the other promoters of the company; and by Mr. Justice Richards, that the company's interest, if any, in the contract in question, cannot in any way affect the defendant.

Digitized by Google

In the second place, the contract in question was not an unilateral contract on the part of the defendant merely beneficial to the company, without any obligation on the part of the company, as are most of the contracts made in favour of an unborn child or other non-existing cestui que trust.

By the contract, the company is under no obligation to accept the bricks to be delivered by defendant, at the times and places, for the price, and on the other terms provided for in the contract, and to pay for the same. Supposing the company on coming into existence had found elsewhere, on more favourable terms, the brick that it wanted for its construction contracts, and had refused to accept the defendant's brick on the terms of the agreement, what recourse could the defendant have had against the company, as no privity of contract existed between the company and himself?

On the ground that the company, not being in existence, could not be bound by the agreement, at the time that it was entered into, and could not be bound afterwards, except by entering into new contracts with the defendant to be accepted in lieu of the contract in question, as provided for in the agreement, and as no such new contracts are alleged to have been entered into, I think the company can have no claim whatever against the defendant under the agreement in question, and that the plaintiff should not be permitted to amend his statement of claim so as to be allowed to claim damages for the company as well as for himself.

In my opinion the appeal should be allowed, and the order allowing the amendments reversed, with costs of this appeal, as well as of the motion before the Referee and the Judge in Chambers.

---

## MANITOBA.

JUNE 9TH, 1905.

FULL COURT.

### WATSON v. MOGGEY.

*Landlord and Tenant — Eviction — Action for — Defence —Forfeiture for Breach of Covenant — Surrender of Lease—Damages—Discretion of Trial Judge—Appeal.*

The plaintiff leased for 3 years a farm belonging to defendant, and alleged that he was evicted by defendant at the end of the first season, and brought this action to recover damages therefor.

Digitized by Google

Defendant, on the other hand, alleged that there was a forfeiture for breach of covenant, or, in the alternative, that there was a surrender by plaintiff.

The lease bore date 21st March, 1903; and on 4th December following defendant served on plaintiff the following notice: "Take notice that I have this day cancelled lease of my farm to you on the grounds of non-fulfilment of terms of said lease." Plaintiff left the premises on that day, and defendant had been in possession ever since.

The case was tried before PERDUE, J., who gave judgment in favour of plaintiff. Defendant appealed.

T. M. Daly, K.C., and G. A. Elliott, for plaintiff.

H. M. Howell, K.C., and T. G. Mathers, for defendant.

The judgment of the Court (DUBUC, C.J., RICHARDS, J.), was delivered by

DUBUC, C.J.:—The trial Judge held that there had been no forfeiture of the lease and that plaintiff was entitled to recover against defendant for his wrongful act in evicting plaintiff, the sum of $700.

Two or three days before 4th December, the parties met in the office of one Axford, in the town of Glenboro, and had come to a settlement, that is, they seemed to have agreed as to the terms on which plaintiff would abandon his lease and give up possession of the premises. But at the last moment there was a dispute about some ploughing for which plaintiff claimed to be paid, and which defendant thought he was not entitled to, and the arrangement for a settlement came to an end. While the settlement was being discussed, plaintiff had shewn that he was in difficult circumstances, and that, unless defendant agreed to guarantee the men's wages for the ensuing year's work, and the store bills to be paid, he would be unable to go on with the working of the farm under the lease. Defendant seemed to have been anxious to assist plaintiff in this respect, and he offered to guarantee the store bills up to $125, but he refused to guarantee the men's wages. When it was seen that they could not finally agree to settle the matter, defendant told plaintiff that he would cancel the lease for non-fulfilment of some of the covenants. Plaintiff said he wanted that in writing, and the next morning defendant gave him the notice above referred to. Plaintiff sold to defendant some oats, barley, and feed he had on the premises; a few days afterwards he came back and sold him his poultry, and he then left the farm altogether.

Was there a forfeiture or surrender of the lease by operation of law, or by the acts of the parties?

Digitized by Google

There is in the lease a covenant by which plaintiff agreed to buy 3 horses from the defendant, and to pay for them by breaking and cleaning of stone on the farm at so much per acre; and in default, to pay in cash at the time of threshing. Defendant contended that plaintiff was guilty of breach of the covenant. The evidence shews that the plaintiff did a small amount of breaking and cleaning, and he contends that, at the time of threshing, defendant had the proceeds of his share of the crop, which was sufficient to pay for the horses. There is a dispute over their accounts, and it does not clearly appear how they really stood. It being so, even if a small balance of $38, or thereabouts, remained due on the horses, there was not such a clear breach of the covenant as to entitle defendant to declare the lease forfeited on that ground. Neither can it be said that there was a formal surrender. The negotiations for the same fell through. The question then is whether there was a surrender by operation of law.

It is laid down that parol surrenders of leases are void; to be effectual a surrender must be either by deed or at least in writing: Fawcett on Landlord and Tenant, p. 486. A mere verbal agreement between the parties, however clear and distinct, does not put an end to the term: per Maclennan, J.A., in Ontario Loan and Investment Co. v. O'Dea, 22 A. R. 355.

It cannot be said, under the above authorities, that in this case there was a real surrender of the lease of plaintiff. It is true, as contended on behalf of defendant, that, in the negotiations for a settlement, plaintiff had said that he could not go on unless defendant guaranteed the men's wages; this was a claim to which plaintiff was not entitled, and which defendant was not bound to allow. Plaintiff may, or may not, have been able to go on, but the parties failed to arrive at a final settlement, and when the negotiations came to an end, plaintiff seemed disposed to stand on his legal right under the lease, and he waited until he was served with the notice to quit. This indicates an intention not to voluntarily surrender the lease, and rebuts the inference that he went away for any other reason but on account of the notice to quit served on him. Whether he had, or had not, any other motive for not going on with the working of the farm, we are confronted with this as the determining reason for quitting.

These being my views, I think the trial Judge was right in holding the plaintiff entitled to recover.

The defendant contends that the damages are excessive, and he asks that they should be reduced.

Digitized by Google

On reading the evidence, my impression was that, by considering the conduct of the plaintiff in the whole matter and the circumstances of the case, a smaller amount of damages might have been deemed sufficient, but the trial Judge exercised his discretion after seeing and hearing the parties, and it seems to me that the amount he thought proper to allow should not be interfered with.

The judgment should be affirmed and the appeal dismissed with costs.

---

## MANITOBA.

PERDUE, J. JUNE 15TH, 1905

### CHAMBERS.

### SAVAGE v. CANADIAN PACIFIC R. W. CO.

*Discovery—Affidavit of Documents Made by Officer of Defendant Company—Cross-examination on—Claim of Privilege—Documents Procured in Contemplation of Litigation—Right of Plaintiff to Full Information—Duty of Officer to Inform Himself—Disclosing Names of Witnesses.*

Application by plaintiff for an attachment against D'Alton C. Coleman, an officer of defendant company, for contempt in refusing to answer certain questions on his examination upon an affidavit on production, made by him on behalf of defendants.

The action was brought by the widow and administratrix of Patrick Savage, deceased, for the benefit of herself and children, to recover damages occasioned by the death of her husband, who was killed in a railway collision while in defendants' employment.

Plaintiff alleged that the collision was due to the negligence of defendants, to the defective state of the engine drawing the train on which the deceased was employed, to the incompetence of a brakesman employed by defendants, and to the negligence of the engine-driver. The action was brought under the Workmen's Compensation for Injuries Act, and at common law.

An order to produce documents was issued by plaintiff and served on defendants. Defendants' affidavit on production was made by Coleman, who described himself as chief

Digitized by Google

clerk in the office of the general superintendent of the central division of the defendant company at Winnipeg, and he stated that he had a knowledge of all documents which were or had been in the custody or possession of the defendant company, relating to the matters in question in this action. The documents produced were 3 letters from plaintiffs' solicitors, and a notarial copy of the letters of administration to the estate of the deceased.

The deponent further stated that defendants had in their possession, but objected to produce, a large number of documents, consisting of statements, copies of letters, data, reports, correspondence, and telegrams numbered 1 to 170, fastened together in a bundle marked with the letter A., and initialled by the deponent. For these documents privilege was claimed, on the ground that they were written, procured, and received by and for defendants' solicitor and under his express instructions, for the purpose of advising defendants in regard to any liability on their part, and in view of anticipated litigation; that they were part of defendants' case, and prepared solely for and under the instructions of defendants' solicitor, especially for litigation and in contemplation thereof. Plaintiff's solicitor examined the deponent upon the affidavit on production under Rule 387.

The object of that examination was to ascertain if defendants had other documents relating to the matters in question and as to the privilege claimed. Answers were refused to a large number of the questions on the advice of counsel. The present application was to compel answers to the questions.

J. E. O'Connor, for plaintiff.

H. A. Robson, for defendants and for Coleman.

PERDUE, J.:—Upon the examination, the deponent admitted that the reports on the accident for which privilege is claimed were made before defendants had any notice of litigation, that they were made partly in view of possible litigation, and partly in the usual course of the transaction of the company's business; also, that on the happening of an accident reports are required whether there is litigation in contemplation or not. It was also admitted that the company's rules require that where an accident happens resulting in injury to persons or in damage to the company's property, the accident must be reported to the proper officer promptly by telegraph and confirmed by mail. The deponent, however, refused to answer questions as to whether the accident in question was reported by wire or by mail to the proper officer. He also refused to indicate by their numbers the reports

Digitized by Google

made to the superintendent, referring to the accident, although admitting that the documents for which privilege is claimed contained reports under the rule as to reporting accidents to the proper officer.

In Wooley v. North London R. W. Co., L. R. 4 C. P. 602, it was held that reports respecting an accident by which an injury was sustained by a passenger on the railway, made by one of defendants' inspectors, by the guard of the train on which the accident happened, and by the local superintendent of the defendants, respectively, to the general manager of the railway, were documents subject to inspection, upon the ground that they were reports or communications made by the agents of the company in the ordinary course of their duty, for the purpose of conveying to the company information on the subject, and were not opinions obtained confidentially with a view to litigation, and this without reference to whether they were made before or after litigation; see, also, Beale v. City of Toronto, reported in a foot note to Hunter v. Grand Trunk R. W. Co., 16 P. R. 386.

Where litigation is pending or anticipated, any communication made confidentially for the purpose of furnishing to the legal adviser materials to enable him to conduct the case or advise his client in reference to the litigation, is privileged: Bray's Digest of Discovery, p. 14.

The reports of the accident in question made at or immediately after its occurrence would, no doubt, afford valuable information to plaintiff, if produced for inspection. It is, therefore, of much importance to her to ascertain if defendants' claim of privilege is well founded. In order to test the validity of such claim of privilege, plaintiff is entitled on the examination upon the affidavit to full and complete information as to when, to whom, and in what circumstances the reports were made.

Prima facie the plaintiff is entitled to production of them, and the onus is upon defendants to shew that they are privileged.

In order to maintain this claim they must submit on this examination to a full investigation into the circumstances in which the documents came into existence, and afford the fullest information in regard to them, short of disclosing their actual contents. When this information has been furnished, it will be for the Court or a Judge to decide the actual question of privilege upon a further motion. The deponent has, I think, said enough on the examination to throw grave doubts on the validity of the privilege claimed. He must, however, go further and make answer as to who received these reports and how they came to be made, were they made by the servants of the company in the discharge of their

Digitized by Google

regular duties and for the purpose of furnishing to their superiors information as to the accident itself, or were they furnished merely as materials from which the solicitor might make up a brief? See Anderson v. Bank of British Columbia, 2 Ch. D. 644, at p. 656.

It has been urged on behalf of those opposing this motion that some of the information sought is not, or may not be, within the knowledge of the deponent. He must, I think, provide himself with that knowledge if it relates to a material point in regard to these documents. He has been put forward by defendants as the proper officer to make the affidavit, and we must take him to be such. The company cannot now evade inquiry by insisting upon his want of knowledge. This examination is in effect an examination of defendants. "Where a party is interrogated as to matters done or omitted to be done, by his agents and servants in the course of their employment, he does not sufficiently answer by saying that he does not know and that he has no information upon the subject. He is bound to go further and obtain information from such servants or agents of his, or he must shew some sufficient reason for not doing it:" per Lindley, L.J., in Bolckow v. Fisher, 10 Q. B. D. 171. In Southwark Water Co. v. Quick, 3 Q. B. D. 321, Cotton, L.J., held that directors of a company in answering interrogatories must get such information as they could from other servants of the company who might have personal knowledge of the facts.

In Harris v. Toronto Electric Light Co., 18 P. R. 285, Meredith, C.J., applied these principles to the case of a manager of the defendant company, who was being examined for discovery, and compelled him to answer where he had knowledge of material facts, and held that if he had not such knowledge, but could obtain it from a servant of the defendants who acquired the knowledge in the course of his employment, he was bound to obtain it so as to enable him to answer the question put to him.

It was also objected on behalf of defendants that answering the questions asked or producing the documents called for might disclose the names of defendants' witnesses. This was not taken as one of the grounds in the affidavit for refusing production. It is not shewn positively that the persons whose names are appended to or mentioned in the documents will be called as witnesses. Even if the names of persons, who might afterwards be called as witnesses, would be disclosed incidentally, and as part of the contents or part of the description of the documents, this would not be in itself a sufficient ground for denying the information.

The mere fact that the discovery sought will involve the disclosure of the names of witnesses is not a sufficient rea-

Digitized by Google

son for refusing such discovery:" per Bowen, L.J., in Marriott v. Chamberlain, 17 Q. B. D. 165; see also Storey v. Lord Lennox, 1 Keen 341, in appeal 1 M. & C. 525; Humphries v. Taylor, 39 Ch. D. 693.

A number of the questions to which answers were refused were directed towards ascertaining if reports had been sent in by the defendants' employees as to the condition of the engine before the accident took place, and the repairs that had been made upon it. I think that full disclosure should be made as to these reports, and the entries in regard to repairs. If the witness has not the information at hand as to the existence of these reports and entries, he is bound to procure it.

The deponent should be compelled to answer questions 1 to 10 inclusive, referred to in the notice of motion, questions 13, 14, 17, 18, 19, 20, and any other questions of a similar nature which may be necessary to elicit the information to which plaintiff is entitled.

The deponent should also answer all the questions on p. 20 of the examination except the first, all on p. 21 which he has refused to answer, and all the questions on pp. 22, 23, and 24.

There will be an order that Coleman attend before the examiner, at his own expense, and answer the questions as above.

The costs of and incidental to this application will be costs to plaintiff in any event of the cause.

---

## MANITOBA.

PERDUE, J. JUNE 15TH, 1905.

SINGLE COURT.

### JOHANNESSON v. GALBRAITH.

*Arbitration and Award—Action for Money Demand—Plea of Payment of Amount Ascertained by Award—Amendment of Statement of Claim—Allegation of Invalidity of Award—Demurrer—Procedure in Attacking Award—Interpretation of Rules of Court—Amendment—Joinder of Claim to Set aside Award with Original Demand—Equitable Jurisdiction—Time for Attacking Award—9 & 10 Wm. III. ch. 15.*

Plaintiffs sued for the balance due on a contract for the erection of a house.

Digitized by Google

Defendant pleaded a submission to arbitration of all matters in difference, an award made thereunder, and payment of all moneys due to plaintiffs in accordance with the award.

Plaintiffs then amended and set up that the award was invalid because the arbitrator made it without giving plaintiffs an opportunity of adducing evidence or of being heard in respect of the matters in dispute.

The defendant then demurred to the amendment on the following grounds:

(a) That it is not open to plaintiffs in this action to attack the award.

(b) That the award is in law binding and conclusive between the parties unless and until the same is set aside or re-opened by independent proceedings.

(c) That the plaintiff's cause of action is merged in the award.

(d) That Rules 773, 774, and 775 of the King's Bench Act do not apply so as to permit plaintiffs to raise by plea any objections to the validity of the award.

C. P. Wilson and T. H. Johnson, for plaintiffs.

G. A. Stewart Potts, for defendant.

PERDUE, J.:—The plea of the submission, the award, and the performance, as pleaded, afford a complete answer to the plaintiffs' statement of claim unless the award can be attacked in this action. Under the former practice a plaintiff could not reply matter attacking or impeaching the award where the award was pleaded. The plaintiff had first to move against and set aside the award before suing on the original cause of action. It is, however, argued on behalf of plaintiffs that the new practice respecting awards laid down in the above Rules permits a plaintiff to question the validity of the award in a suit like the present one, where the defendant relies upon it and takes the position of a party seeking to enforce it.

Rule 773 commences with the words:—"With respect to awards the procedure shall be as follows:"

Then the Rule proceeds to provide a practice for enforcing an award by making it a judgment of the court. The proceeding is to be by motion upon notice to the other parties to the award.

Any party served may oppose the motion and attack the award. Amendments may be allowed as in an action, and the powers of the Court respecting procedure are to apply to motions on awards and proceedings thereunder.

Digitized by Google

By Rule 774 it is declared that the former practice with respect to awards shall not be abolished, but the same shall only be followed by special leave of the Court or a Judge.

It appears to me that the clear intention of the above Rules was to provide a new procedure which should take the place of that previously in force. By a strange oversight in the framing of Rule 773, there is no procedure provided for setting aside an award at the instance of a party dissatisfied with it. Such party may attack the award if it is sought to be enforced against him, but it does not appear to be open to him under Rule 773 to make a substantive motion to have it declared invalid.

Plaintiffs in the present case desire to question the validity of the award, but I cannot see that they are in the position of a party opposing the enforcement of the award in a motion made in accordance with the practice provided in the Rule. They have sued upon the original cause of action, an existing award covering that cause of action has been pleaded, and this is a complete answer to the plaintiffs' claim so long as the award exists. There is nothing in Rule 773 which allows a plaintiff to plead in an action matter affecting the validity of the award. The award must, as under the old practice, be set aside before the plaintiff is entitled to bring suit on the original cause of action.

I am, therefore, of opinion that as the pleadings stand the defendant is entitled to succeed on the demurrer.

The question still remains, can plaintiffs amend and attack the award in this action and ask judgment also on the original claim?

There is nothing on the face of the pleadings to shew whether or not the award in question comes under the statute 9 & 10 Wm. III. ch. 15. The former practice as to setting aside awards under that statute, for corrupt or undue practice, was by rule or motion before the last day of the next term after the publication of the award: Russell on Awards, 5th ed., p. 649.

Courts of equity always exercised jurisdiction over awards, and it was for a long time unsettled whether they were bound by the statute of Wm. III. Finally it was decided that by force of the statute the Court of Chancery had jurisdiction only to set aside awards by employing the summary proceedings pointed out by the Act and within the time limited by it. See Russell on Awards, pp. 696-702, also Henning v. Swinerton, 1 Coop. Ch. Cas. 386, the notes to which contain a collection of the cases.

But, in respect to cases not within the statute, a bill in equity always lay to set aside an award for fraud, or misconduct on the part of the arbitrator: Russell, p. 707.

Digitized by Google

If the award in this case is not under the statute of Wm. III., an action might be brought by plaintiffs to set aside the award and at the same time for judgment on the original cause of action.

If, however, the award is one within the statute, what procedure is now open to a plaintiff and within what time must he move? If the practice under the statute of Wm. III. has the same binding effect as it formerly had, plaintiffs are now clearly too late to apply. That practice, however, is not immediately available and open to him, as it was before the enactment of the present Rules of Court.

He can only make use of the former practice by obtaining the leave of the Court or a Judge.

In our King's Bench Act there still remains the inherent power over awards formerly possessed by the Court of Chancery in England: K. B. Act, sec. 6 (*b*). This power may still be invoked unless it is ousted by some statutory provision. There is nothing in the Rules of Court to prevent the bringing of a suit to set aside an award, the practice contained in the Rules making no provision for any other method of attacking it at the instance of a party objecting to it. An award may therefore be attacked in a suit brought for that purpose unless the jurisdiction of the Court still remains displaced by the statute of Wm. III.

The effect of Rule 774 is to suspend the former practice, that practice not being abolished, but made available to suitors only in the event of its operation being called into effect by the order of the Court or a Judge. The Rules being part of the King's Bench Act, they have the same validity as if they were clauses of the Act itself, and they are equally potent to repeal or modify a prior statutory enactment. It may well be contended that a procedure which can only be made use of by special leave of the Court, a procedure in place of which a new system has been provided, can no longer be regarded as the one to be exclusively followed, even in regard to matters for which the new system does not make provision, if there is other machinery in the Court capable of effecting the same purpose.

In Henning v. Swinnerton, 1 Coop. Ch. Cas. 386, Lord Chancellor Cottenham held that the jurisdiction of the Court of Chancery over awards was altogether excluded where the submission was to be made a rule of a Court of common law, and he considered that it was more consistent with principle to hold that it was equally excluded where the submission was to be made a rule of the Court of Chancery itself, unless exercised in the manner pointed out by the statute. He was of opinion that in the case then under consideration, the questions raised could have been discussed

Digitized by Google

as conveniently and effectually as if the plaintiff, instead of filing a bill, had made the submission a rule of Court and had then applied to set aside the award. He intimated, however, that he did not decide that there could be no case in which a bill would not be a proper mode of proceeding.

The argument of convenience and effectiveness in favour of the procedure render the statute of Wm. III. would not apply in the present case.

Under that practice a motion for leave to apply would first have to be made, then the submission would have to be made a rule of Court, and this would have to be followed by a motion to set aside the award, after which a suit might be brought on the original cause of action, if the award had been set aside on the motion, and if the plaintiff was not debarred from suing.

It would be much more convenient and expeditious, in addition to the saving of expense, if the plaintiff could, in a suit brought for the purpose, dispose of the award and of all matters in dispute between the parties at the one time and at the one hearing.

It appears to me that where the new practice provided by the Rules is defective in not providing means for moving against the award, and where the former procedure is not open except by leave of the Court or a Judge, the party desiring to move may invoke the inherent powers over awards which the Court possesses as a Court of equity.

So far as the lapse of time in moving against the award is concerned, I incline to the view that, as the former procedure is not immediately available to the plaintiff, but is suspended until leave to use it is obtained, there must be sufficient opportunity given to make the motion after the leave is granted, notwithstanding the previous lapse of time.

Rule 773 sets no time limit against a party attacking an award where the opposite party seeks to enforce it against him. Both parties should be in the same position as regards the time for attacking the award. When leave to invoke the old procedure is applied for, I think it may reasonably be inferred from Rules 773 and 774 that the Court or a Judge may permit the use of the former procedure although the time limited by it for making the motion may have expired. It is the procedure itself that may be put in motion by the Court or Judge, without necessarily introducing the time limit.

If the old procedure is not invoked but remains suspended, I think the award may be attacked in an action, although the time has expired within which it could be moved against under the former practice.



Digitized by Google

If plaintiffs desire, they may have leave to amend within two weeks by asking to have the award set aside, in addition to the other relief asked.

The costs of the demurrer will be costs to the defendant in any event of the cause.

If plaintiffs do not amend, the demurrer will be allowed with costs.

---

## MANITOBA.

DUBUC, C.J. JUNE 20TH, 1905

TRIAL.

### GREY v. STEPHENS.

*Building Contract — Delay Caused by other Contractors — Failure to Notify Architect and Apply for Extension of Time—Penalty for Delay—Provisions of Contract.*

Plaintiff, a builder, contracted with defendant, by writing under seal, to do the carpenter and hardware work in a house to be built for defendant, and brought this action to recover a balance alleged to be due.

A. E. Hoskin, for plaintiff.

F. H. Phippen and G. D. Minty, for defendant.

DUBUC, C.J.:—The contract was signed on 2nd July, 1903, and the house was to be completed on 15th September following. There was a penalty of $20 a week to be charged for every week after that date for non-completion of the contract, provided that no just cause would "prevent the contractor from completing his contract by the neglect of any other trades of this contract for completing the building."

The plaintiff went to work to perform his contract as soon as he could do so, and continued to do diligently his part of the work; but he was greatly delayed by the other trades who had contracts for other parts of the building, particularly the stone masons, who had to construct the foundations, and the plasterers. The house was not practically completed until 14th March, 1904, and even then there remained to be done the placing of two ornamental columns between the dining room and the parlour, and they were put in about the middle of April; but that did not interfere with the occupation of the house by defendant, who went in and occupied it on 8th March.

Digitized by Google

The contract was for $3,990, and there was $130.25 of extra work done, making a total of $4,125.25. On certificates of the architect issued while the work was going on, plaintiff was paid $3,480. Of the last two certificates one was for $135.25 extra work, and the other for $465, made up as follows:

| | |
|---|---|
| Amount of contract | $3,990 00 |
| Less deductions | 45 00 |
| Previous certificates | 3,480 00 |
| Present certificates | 465 00 |

It had at the bottom the following note: "This certificate is subject to any claim there may be for delay in completion of the work." The deduction of $45 is for expenses of heating the house to dry the plastering while the work was going on, and it was charged to plaintiff.

Defendant has shewn that the delay in completing the house has caused him serious damage and inconvenience, to the amount of the balance claimed by plaintiff, and he avails himself of the penalty clause of $20 a week provided for in article 6 of the agreement. That article 6 is the one above referred to, with a proviso as to delays caused by the neglect of the other trades.

The following observations may be made as to such delays.

At the start the foundation work was supposed to take about 2 weeks, which would allow plaintiff to commence the carpenter work about the middle of July; the foundations were not finished until about 22nd August. That was a delay of 5 weeks, over which plaintiff had no control whatever. He then built the frame of the house as fast as the work could be expected to be done; then the plastering took a great deal more time than was anticipated; that work was delayed by wet weather and afterwards by frost. The carpenter work inside could not be done until the plastering was dry. Several other delays were caused by the plumbers, those charged to put in the heating apparatus, the painters, the electricians.

On the evidence I find that plaintiff started with his work as soon as he could; that he proceeded with his work as diligently and as rapidly as, in the circumstances, he could reasonably be expected to do; that the delays in completing the house for occupation were caused by the other trades who had separate contracts for building the same. And, notwithstanding the damages and inconveniences suffered by defendant, as plaintiff was not responsible for the delays, I

Digitized by Google

would, if article 6 stood alone in the contract, hold plaintiff entitled to recover the whole amount of his claim. But article 6 is qualified and modified by article 7, which reads as follows:—"Should the contractor be obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay, or default of the owner, or the architect, or of any other contractor employed by the owner upon the work, or by any damage which may happen by fire, lightning, earthquake, or cyclone, or by the abandonment of the work by the employees through no default of the contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid; but no such allowance shall be made unless a claim therefor is presented in writing to the architect within 36 hours of the occurrence of such delay. The duration of such extension shall be certified to by the architect, but appeal from his decision may be made to arbitration, as provided in article 3 of this contract."

Plaintiff admits that he never presented a claim in writing to the architect for allowance to be made on account of delays caused by the other trades, neither within 36 hours of the occurrence of such delays, nor at any other time. Not having done so, I do not see how he can be held entitled to claim the benefit of the provision of article 6, or of the extension of time provided for in article 7.

The provision requiring the presentation of a claim in writing to the architect within 36 hours may be, and is in effect, a very hard one for plaintiff in this case, and the consequence of his failure to do so is very serious to him, but it was a part of his contract, and he failed to live up to it. He must, therefore, be held liable for the penalty provided for in the contract.

I hold that the house, which was to be finished on 15th September, was practically completed on 14th March following, 26 weeks after the time provided for in the agreement, which at $20 a week makes $520.

As to the $45 deducted for heating, I do not think that, in the circumstances, it should be charged to plaintiff.

To resume: the amount of the contract is $3,990; extra work certified to by the architect $135.25, total $4,125.25. Amount received by plaintiff $3,480, difference $645.25 due him on the work done. To be deducted under the penalty clause $520, leaving a balance of $125.25, for which judgment should be entered in favour of plaintiff with costs.

Digitized by Google

## MANITOBA.

DUBUC, C.J. JUNE 20TH, 1905.

TRIAL.

### VULCAN IRON WORKS v. LEARY.

*Company — Sale of Goods for Use of Company about to be Formed—Action for Price—Goods Charged to Manager of Company Personally—Liability.*

About the beginning of March, 1901, defendant went to plaintiffs' shops in Winnipeg, saw the president, J. McKechnie, and the manager, E. G. Barrett, bought from them an engine and boiler and some additional fittings, and gave instructions to have the articles shipped to him at Altamont, Man. He informed them that the machinery was for manufacturing bricks on his land at Altamont, and that he was organizing a company to undertake the work. The goods were shipped on 6th March, and received by defendant in due course. Plaintiffs opened an account in their books in defendant's name, and charged the goods to him personally. The account ran up to 29th August, with a small additional item of $4.50 charged on 3rd April, 1902. Three payments were made by cheques and were credited to defendant.

Letters patent incorporating the new company were issued on 13th March, and defendant was appointed managing director.

Orders for more goods were sent to plaintiffs by telegrams signed "G. Leary," or "Geo. Leary," without any qualification or any mention of the company. One of the orders was by letter signed in the same manner, but it was written on a sheet of paper headed, "Boyne Valley Brick Works, Geo. Leary, Manager." The goods ordered and shipped were always consigned to George Leary.

Plaintiffs sent monthly accounts to defendant, in which the goods were charged to him personally. Several letters were written by plaintiffs about the account and were directed personally to George Leary.

This went on for some time, until the latter part of 1902, and defendant never objected, or remonstrated, or in any way intimated that the goods were not bought on his account, or that he was not liable for them. In his letter of 25th May, addressed to plaintiffs, he said, "I will be in the city within a couple of weeks at the latest and arrange everything to your satisfaction. Yours truly, Geo. Leary." Not a word

Digitized by Google

suggesting that the company alone was liable for the goods in question. The account not having been paid, plaintiffs sued.

A. E. Hoskin, for plaintiffs.

E. L. Taylor, for defendant.

DUBUC, C.J.:—Defendant alleges that he bought the goods for the price of which this action was brought for the Boyne Valley Brick Works Co., Limited, as manager thereof, and not on his own account, and that plaintiffs had notice of the same. He says that when he first went to plaintiffs' office he told them that the goods were for the company intended to be formed, and that the company were to pay for them, but that is denied by both McKechnie and Barrett.

It may be that defendant intended that the goods he purchased should be charged to the company, but we must look at the dealings between the parties as they actually took place, and not as it may have been intended by one of them, and not expressed to the other.

In the first place, when the goods were purchased and the account opened, the company was not yet in existence. That company, when finally formed, could not be bound by what had been previously done by Leary on its behalf, and plaintiffs were only acting with prudence in opening the account with Leary and charging him with the price of the goods, instead of debiting them to a non-existing company. If they had charged the company, and the company, when formed, had repudiated the liability, plaintiffs would have had no recourse against the company. A company cannot, even by adoption or ratification, obtain the benefit of a contract purporting to have been made on its behalf before it came into existence.

To obtain such benefit a new contract must be entered into by the company on the terms of the old contracts: Natal Land Co. v. Pauline Colliery Syndicate, 73 L. J. P. C. 22; Woodruff v. Eclipse Office Furniture Co., 4 O. W. R. 165.

In the second place both McKechnie and Barrett state that, although Leary made mention of a company to be formed, he never asked that the account be opened in the company's name. Leary himself does not say that he made any such request. There is the fact that in the sales book, ledger, and other books of plaintiffs, the name of Leary alone appears in connection with the transaction; he is alone debited with the goods sold, and credited with the payments made. There is the further fact already mentioned that plaintiffs sent to Leary all their accounts, charging him personally, and all their letters, demanding payment from him,

Digitized by Google

and that he never objected or even intimated that the goods should not have been charged to him personally. The cheques sent in payment were signed, "Geo. Leary, manager, Boyne Valley Brick Works," but that is not inconsistent with the view that, as managing director of the company, he might be authorized to draw on the company's funds to pay for goods he had bought himself for the company's use and resold or otherwise turned over to the company. At all events it cannot affect the position of plaintiffs, who from the beginning and throughout, dealt with Leary and treated him as the real purchaser of the goods, without his saying or doing anything to let them know that it should have been done otherwise.

There can be no question that, when the engine and boiler were sold and the account opened, plaintiffs were not only justified in charging the goods to defendant, but, as the company was not in existence, it would have been very unsafe to charge them to the company. They might have made a new contract with the company after it was formed, but they were never asked to do so, and they continued to deal with Leary personally all along.

In such circumstances I do not see how defendant can escape being held liable for the price of the goods in question.

Judgment should be entered for plaintiffs for $657.03, with interest and costs.

---

## MANITOBA.

DUBUC, C.J. JUNE 20TH, 1905.

SINGLE COURT.

### RE FISHER AND VILLAGE OF CARMAN.

*Municipal Corporations—By-law Regulating Billiard Rooms —Licensing Powers—Provision as to Times for Closing —Lord's Day Observance—Constitutional Law—Provision as to Screens—Discrimination.*

Motion to quash by-law No. 87 of the village of Carman, on the ground that it was ultra vires of the council of the village and of the statutes under the authority of which it purports to be passed; and on the further ground that it was unreasonable and oppressive and discriminated between certain classes of people in the community in that the burden of it did not fall equally upon all citizens.

F. J. Butcher, for applicant.

F. H. Phippen, for the village corporation.

Digitized by Google

DUBUC, C.J.:—The by-law in question was passed under sec. 640 of the Municipal Act, by which the council of every municipality is empowered to pass by-laws: "For licensing, regulating, and governing all persons who, for hire or gain, directly or indirectly, keep or have in their possession or in their premises, any billiard, pool, or bagatelle table, or who keep or have a billiard or bagatelle table in a house or place of public entertainment or resort, whether such billiard or bagatelle table be used or not."

By-law No. 87 provides that:

"(1) All pool rooms or billiard rooms shall be closed from the hour of half past 8 o'clock in the afternoon of every Saturday until the hour of 7 o'clock in the forenoon on the following Monday morning, and shall remain closed on every other day from the hour of 10 o'clock in the evening until the hour of 6 o'clock in the following morning.

"(2) All screens or other devices for obscuring the view from the outside into such pool room or billiard room shall be removed during the hours prohibited in the foregoing paragraphs."

It was contended on behalf of the applicant that the by-law was ultra vires, because it relates to Sabbath observance. The case of Attorney-General for Ontario v. Hamilton Street R. W. Co., [1903] A. C. 524, was quoted in support of this contention. It was held in that case that a Lord's Day Observance Act which imposes penalties for the infringement of its provisions was a matter of criminal law reserved by sec. 91, sub-sec. 27, of the British North America Act, 1867, for the exclusive legislative authority of the Parliament of Canada, and that it is therefore ultra vires of a provincial legislature to pass such an Act.

Neither the by-law nor the provision of the Municipal Act make any reference to the Lord's Day observance; but it is argued that the provision of the by-law requiring pool and billiard rooms to be closed from Saturday evening until Monday morning is intended for Sunday observance. This may be true but it would be so only by intendment, and not by express enactment. Considered in that light the argument raises a constitutional point of great moment, and, as it might affect other legislation on cognate subjects, I do not think it would be advisable to determine that important question without giving the Attorney-General for the Province an opportunity of having the matter looked into and of presenting the views of the Government on the constitutional aspect of the case. But I do not deem it incumbent upon me to decide that point on the present application. The by-law was passed under a provision of the Municipal Act for "licensing, regulating, and governing" pool and billiard rooms.

Digitized by Google

To the power of licensing is added the power to regulate, namely, to determine the mode and method by which the license is to be enjoyed, and these include, I think, the conditions, as to time and otherwise, under which the licensee is to have the benefit of the license. It does not appear to me to be necessary to investigate and consider the particular reasons which may have induced the municipal council to impose upon the licensee the conditions that his pool or billiard room shall not be opened during a certain day of the week any more than during certain hours of the day. The reason may be surmised, but that is not sufficient to declare that the by-law is bad and should be quashed, when there is nothing on its face expressing or indicating what the reason may be. Taking this view of the case, I am not prepared to hold that the by-law is ultra vires.

As to the other point raised; I do not think that the provision of the by-law requiring the screens of the pool and billiard rooms to be removed during the prohibited hours is unreasonable or oppressive, and that it should be held invalid for discriminating between certain classes of people.

It is only a condition attached to the granting of the license, and it comes within the power of regulating the mode by which the licensee is to enjoy the privilege of his license. The other people are not affected by it because they do not ask for such privilege.

In my opinion the motion should be refused without costs.

If the matter is taken before the full Court on appeal from my decision, I suggest that the Attorney-General be duly notified and may be heard on the constitutional point raised.

---

## BRITISH COLUMBIA.

IRVING, J. JUNE 3RD, 1905.

COURT.

### RE WATKINS.

*Will — Construction — Direction to Pay Testamentary Expenses — Devise — Succession Duty—Charge Against Devisee — Municipal Taxes — Provincial Government Taxes—Residuary Estate—Charge.*

Petition by the trustees and executors of the last will and testament of Elizabeth Watkins, who died on the 3rd November, 1900, for an order determining certain questions arising in the course of the administration of the estate. Probate of

Digitized by Google

the will, which was dated 10th February, 1896, was granted to the petitioners on 29th November, 1900.

Thornton Fell, for petitioners.

R. T. Elliott, for certain beneficiaries.

IRVING, J.:—By her will the deceased (1) directed that all her just debts, funeral and testamentary expenses, should be paid, and, subject thereto, she bequeathed to her sister, Caroline Humphreys, certain specified chattels: with these we are not now concerned. (2) She then devised to her said sister certain lots in the city of Victoria and also certain land in Esquimalt district. (3) She then devised to trustees a certain parcel of land called the Yates street property to be held by them upon certain trusts. The will then proceeded as follows:—

"I devise and bequeath all my real and personal estate not hereby otherwise disposed of unto my trustees" (the petitioners) "upon trust to sell, call in, and convert into money the same or such part thereof as shall not consist of money, and with and out of the moneys produced by such sale, calling in, and conversion, and with and out of my ready money, to pay my funeral and testamentary expenses and debts, and I declare that my said trustees shall stand possessed of the said residuary trust money in trust," &c.

The contention of Mr. Fell, who appeared for the petitioners, was that the succession duty payable under the Succession Duty Act in respect of the real estate devised to Caroline Humphreys was one of the "testamentary expenses" mentioned in the paragraph quoted, and was therefore payable out of the residuary estate. The beneficiaries under the will (other than the petitioners) contended that the real estate should bear its own burden, that is to say, that the succession duty levied in respect of the real estate devised to Caroline Humphreys should be paid by her.

Upon examining the Succession Duty Acts, R. S. B. C. ch. 175, as amended in 1899, ch. 68, and in 1900, ch. 35, it will be found (4a) that all property situate within the province and any interest therein passing by will or intestacy is subject to succession duty.

By sub-sec. (5) the executor is required before the issue of probate to him, or within such time as may be limited for that purpose, to make and file a true and correct statement under oath shewing (a) a full itemized inventory of all the property of the deceased person and the market value thereof; (b) the names of the persons to whom the same will pass, and the degree of relationship in which they stand to the deceased. The Act goes on to provide that before the

Digitized by Google

probate issues the executor shall deliver a bond in a penal sum equal to 10 per cent. of the sworn value of the property liable to succession duty, conditioned for the due payment to the Crown of any duty to which the property coming to the hands of the executor may be found liable. The Act then provides the rate payable, which rate varies with the amount of the aggregate value of the property of the deceased, and the degree of relationship in which the beneficiaries stand to the deceased. It then makes this provision, which, having regard to the points in dispute, is of the utmost importance:—"The duties hereby imposed shall be deducted from the share of each person entitled to share in the estate according to the rate applicable as above to such person's share." I think that proviso determines the point in dispute.

In re Holland, 3 O. L. R. 406, is an authority for the proposition that the words "testamentary expenses" do not include succession duty.

I therefore, as to the first question, decide that the succession duty payable under the Succession Duty Act in respect of the real estate of the deceased, did not form part of the testamentary expenses of the deceased, but is chargeable against the different properties devised under the will.

As to the second point: At the time of Mrs. Watkins's death taxes were owing to the city of Victoria on the real property devised to Caroline Humphreys, amounting to $1,519.74, and on the Yates street property to the sum of $765, and on certain of the property forming part of the residuary estate $866.05 to the city and $72 to the province. The question submitted in respect of the taxes is as follows:—Are the taxes payable to the city of Victoria and the provincial government debts of the deceased, and payable out of the residuary estate, or are they to be charged against the different properties in respect of which the said taxes have been assessed?

In regard to the provincial taxes, ch. 179, sec. 80, provides that the person liable to pay taxes imposed by this Act shall be personally liable for the amount thereof. By sec. 87 a right of distress is given against the goods and chattels of the person who ought to pay the taxes; and by sec. 121 it is enacted that if the taxes payable by any person cannot be recovered in any special manner provided by the Act, they may be recovered with interest and costs as a debt due to the Crown. I think these questions clearly establish that the provincial taxes were debts due by her, and therefore payable out of the residuary estate.

With regard to the taxes due to the city I have arrived at the same conclusion.

Digitized by Google

By sec. 155 it is enacted that personal licenses, taxes on real estate, and rates payable by any person, may be recovered by the corporation, with interest and costs, as a debt due to the municipality. I think the provisions of this section entirely dispose of Mr. Elliott's argument that the city has no remedy against the executors.

As to his contention that this imposition of taxes was a charge within the meaning of Locke King's Act, I am unable to agree.

The second question will therefore be answered in this way:—Taxes payable to the city of Victoria and provincial government were debts of the deceased, and are payable out of the residuary estate, and are not to be charged against the different properties in respect of which said taxes have been imposed.

The costs, as between solicitor and client, of all parties will be out of the estate.

---

## BRITISH COLUMBIA.

DUFF, J. JUNE 5TH, 1905.

CHAMBERS.

### RE SEA.

*Husband and Wife—Estate of Deceased Wife—Liability for Funeral Expenses—Married Woman's Property Acts—Duty of Husband—Indemnity.*

Sarah Eliabeth Sea died intestate, leaving a husband and some brothers and sisters. The husband was appointed administrator, and sought to charge against the estate of his wife the expenses incurred by him in burying her.

The question of his right to do so was brought up on originating summons.

F. B. Gregory, for brothers and sisters of deceased.

W. C. Moresby, for the husband.

DUFF, J.:—The husband's duty to bury his dead wife at his own charge is neither based upon nor incidental to his marital proprietary right. It is founded in the marriage relation itself. Its true correlative is his right to nominate the place of his wife's burial and to prescribe the manner of her obsequies.

Digitized by Google

The Married Woman's Property Acts do not expressly or by necessary implication deal with this obligation; nor do they affect the marriage status. I am therefore unable to agree with the view tentatively advanced by Mr. Lush in his book on "Husband and Wife" (which is also the view held by so distinguished a jurist as Mr. Justice Holmes respecting the effect of the parallel legislation of the State of Massachusetts) that the reduction of the jus mariti effected by these Acts involves the relief of the husband from the burden of this last act of piety and charity. Such an interpretation would, in my judgment, be legislative in its character. With respect to the weighty authority of Mr. Justice Holmes's opinion, one may observe that eminent American Judges, in the application of legislative enactments, do permit themselves a latitude of interpretation which a British Court would not feel itself free to exercise.

It is equally clear that there is no right of indemnity out of the wife's estate. Of course, where the wife's property, being under settlement, is in course of administration in a Court of equity for the benefit of her creditors, a creditor resorting to that Court to enforce his demand may be put upon terms to act fairly; and this, doubtless, is the explanation of the decision in Re McMynn, 33 Ch. D. 576.

The husband fails, and must pay the costs.

---

## BRITISH COLUMBIA.

MORRISON, J. JUNE 29TH, 1905.

TRIAL.

## CITY OF VANCOUVER v. BRITISH COLUMBIA TELEPHONE CO.

*Telephone Company—Rights over Streets of City—Control of Municipal Corporation — Underground Wires — Injunction — Declaration of Right — Construction of Statutes.*

Action for an injunction restraining defendants from digging up the streets of the city of Vancouver for the purpose of putting their wires underground, and for a declaration of the rights of the respective litigants as to the control of the city streets, whether defendants had the right to enter upon any street whatever, merely subject to the

Digitized by Google

approval of plaintiffs, or whether plaintiffs had the absolute control of the streets.

Joseph Martin, K.C., and A. McEvoy, for plaintiffs.

E. P. Davis, K.C., and L. G. McPhillips, K.C., for defendants.

MORRISON, J.:—This is an action brought by the corporation of the city of Vancouver against the British Columbia Telephone Company, Limited, for wrongfully excavating a certain lane within the limits of the plaintiff corporation, and for an injunction restraining them from a repetition of the acts complained of.

In the month of April, 1905, defendants notified plaintiffs of their intention to lay wires underground, and asked their permission to do so. Accordingly conferences were held between them, resulting in the engineers of the respective parties, under proper instructions, locating manholes along the route where the streets were to be excavated. A plan of the said route and located manholes was approved by the engineer of plaintiffs, who duly signed the same. Up to this time he had neither heard nor was he aware that plaintiffs had any objection to the proposed work of defendants. Some time afterwards, however, he did hear that plaintiffs had some objections, and upon defendants requesting him to sign a letter giving them permission to lay their wires underground, he refused.

On 14th June, 1905, defendants entered upon and commenced excavating the lane in question for the purpose of installing their conduits therein, whereupon plaintiffs objected, and the present action was brought, wherein the parties seek a declaration of their rights under their respective charters.

The defendants claim to derive some of their present powers from the New Westminster and Burrard Inlet Telephone Company, Limited, incorporated in 1884, under the name of the New Westminster and Port Moody Telephone Company, and in 1886 the charter was amended and the name changed to the New Westminster and Burrard Inlet Telephone Company, Limited. It is contended on behalf of plaintiffs that this charter has expired. I do not agree with this contention. By sec. 23 of the Act of 1884, the powers and privileges of the company were to continue for 10 years from

Digitized by Google

the passing of the Act. By sec. 7 of the amending Act of 1886 the powers and privileges granted by the principal Act and by the amending Act were to continue for a period of 12 years from the passing of the amending Act. By sec. 4 of the New Westminster and Burrard Inlet Telephone Company Amending Act, 1891, sec. 7 is repealed, the effect of which, in my opinion, is to continue the existence of the company.

On 6th April, 1886, Vancouver city was incorporated. On 31st August, 1900, an Act to revise and consolidate the Vancouver Incorporation Act was passed, sub-sec. 15 of sec. 125 of which empowers the city to pass a by-law as follows:

"For authorizing any gas, water, telephone, electric light, district messenger, power, heating, tramway, street railway company, to lay down pipes, erect poles, string wires under or over the public streets, lanes, or squares, and to operate the business connected therewith for a period of years, subject to such regulations and such terms of payment for the privilege as the council sees fit: Provided that no gas, water, telephone, electric light, district messenger, power, heating, tramway, or street railway company shall have any powers or right to lay down pipes, erect poles, string wires, or in any way interfere with the streets, lanes, or squares of the city, or operate any business in the city connected therewith, unless a by-law has been passed under the provisions hereof granting permission to do so and containing the terms and regulations under which the same may be done and terms of payment to the city therefor."

And sec. 218 provides that:

"Every public street, road, square, lane, bridge, or other highway in the city shall be vested in the city (subject to any right in the soil which the individuals who laid out such road, street, bridge, or highway may have reserved), and such public street, road, square, lane, or highway shall not be interfered with in any way or manner whatsoever by excavation or otherwise by any street railway, gas, or waterworks company, or any companies, or by any company or companies that may hereafter be incorporated, or any other person or persons whomsoever, except having first made application and received permission of the city engineer in writing."

This section is the same as sec. 213 of the Act of 1886, except that the latter omits any reference to companies hereafter to be incorporated.

Digitized by Google

On 6th April, 1886, the New Westminster and Burrard Inlet Telephone Company's amending Act was passed, secs. 1, 2, and 3 of which give the company power to erect poles in the city of Vancouver without the supervision of the council, but no authority is given to place wires underground.

The Vancouver Electric Light Company was also incorporated on 6th April, 1886, and by sec. 25 the powers conferred are made exercisable in conformity with the city by-laws.

On 20th April, 1891 (ch. 67), the Vernon and Nelson Telephone Company was incorporated. Sub-sec. (b) of sec. 7 enacts:

"And in municipalities the breaking up and opening of streets for the erection of poles or for carrying wires underground shall be subject to the approval of the municipal council of such municipalities."

On 11th May, 1903, the Vernon and Nelson Telephone Company's Act was amended, and sec. 5 thereof enacts as follows:

"Section 7, except sub-secs. a, b, and c thereof, of said ch. 67, is hereby repealed and the following enacted in lieu thereof:

"(1) The company may construct, erect, operate, and maintain a line or lines of telephone along the sides of and across or under any highway, streets, public bridges, or any such places in and throughout the province of British Columbia as the company from time to time determines; and the company may, by its servants, agents, or workmen, enter upon any highway, street, public bridge, or any such place in the province of British Columbia, for the purpose of erecting, operating, and maintaining its line or lines of telephone along the sides of or across or under the same, and may construct, erect, and maintain such and so many poles and other works and devices as the company deems necessary for making, completing, supporting, using, working, operating, and maintaining the system of communication by telephone, and may stretch wires thereon and from time to time as often as the company, its agents, officers, or workmen think proper, break up or open any part or parts of the said highways or streets, subject however to the following provision:

"Sub-section b of sec. 7 of the Act, 1891, ch. 67:

"And in municipalities the breaking up and opening of streets for the erection of poles or for carrying the wires

Digitized by Google

underground, shall be subject to the approval of the municipal council of such municipalities."

Section 6 enables the company to acquire the property, undertakings, franchises, business, rights, contracts, powers, or privileges of other companies having objects in whole or in part similar to the objects of their own, and power is by the same section given such companies to dispose of such powers, etc. By virtue of this enactment the defendant company acquired the powers, etc., of the "New Westminster and Burrard Inlet Telephone Company, Limited."

On 6th July, 1904, by the approval of the Lieutenant-Governor in council, the name of the "Vernon and Nelson Telephone Company, Limited," was changed to that of the "British Columbia Telephone Company, Limited," the name in which defendants appear in this action.

It is contended on behalf of plaintiffs that defendants are subject to sub-sec. 15 of sec. 125 and sec. 218 of the Vancouver Incorporation Act, 1900, and that none of the powers contained in defendant company's charter in any way affect plaintiffs. In this view I do not agree.

The streets were vested in the city for certain general purposes such as securing to the public thoroughfares throughout the city. And powers were given by the legislature to the company in respect to those streets for certain other purposes.

Those respective powers may subsist together. I can find no provision of the legislature which empowers the city to prohibit the defendant company from exercising its statutory powers, nor is there any authority enabling the defendant company to exercise certain of those powers without the approval of the city. The city cannot prohibit the company from exercising its powers by a refusal to approve. Even if there should be a conflict between the provisions of the city charter and that of the defendant company, by the application of well known canons of construction of statutes I am bound to hold that those of the defendant company in this instance prevail. Neither sub-sec. 15 of sec. 125 of the Act of 1900 (even if it applied to the defendant company, which in my view of the nature of the powers conferred upon it by the legislature it does not), nor yet sec. 218 can prevail as against



Digitized by Google

sec. 5 of the company's charter of 1903, which is specific and unambiguous in its enactments.

The Act respecting the New Westminster and Burrard Inlet Telephone Company, Limited, the Vancouver Incorporation Act, 1886, and the Act respecting the Vancouver Electric Light Company, were all passed on the same day. The telephone company and the electric light company were given power to erect poles and string wires in the streets of the city. The electric light company is to exercise this power in conformity to by-law. This restriction does not apply to the telephone company. I look at the electric charter to assist in ascertaining the intention of the legislature, when legislating upon the same subject matter in the same locality.

These Acts in so far as they give similar powers in the same municipality, are to that extent statutes in pari materia, and may be looked at in ascertaining the meaning of the legislature: Committee of London Clearing Bankers v. Commissioners of Inland Revenue, [1896] 1 Q. B. 227-8; Colquhoun v. Brooks, 14 App. Cas. 506, 59 L. J. Q. B. 59.

When the legislature passed sec. 218 of the charter, 1886, on the same day, did they intend its scope to include the telephone company? If so it is most reasonable to expect some specific enactment to that effect either in the city charter or that of the company, but there is none. Again if there is a conflict, the company's charter being later in date, or at least in receiving the royal assent, must prevail: The King v. Justices of Middlesex, 2 B. & Ad. at p. 821; Dryden v. Overseers of Putney, 1 Ex. 223, 232; Attorney-General v. Great Eastern R. W. Co., L. R. 7 Ch. 475; Taylor v. Corporation of Oldham, 4 Ch. D. 395; Trustees of Birkenhead Docks v. Laird, 18 Jur. 883; City and South London R. W. Co. v. London County Council, [1891] 2 Q. B. 513.

In the present action it is contended on behalf of the city that no permission as required by sec. 218 of the Act of incorporation, 1900, was given. Being of the opinion that the Vernon and Nelson Telephone Company Amendment Act, 1903, empowers the defendant company to enter upon and break up the streets of the city for the purposes of its works subject to the approval of the council, which is a right to regulate not to prohibit, it might not be necessary for me to deal with the question as to whether the consent mentioned in sec. 218 was given or not. However, I find as a fact

Digitized by Google

that permission was asked by defendants to lay their wires underground along the route indicated in the plan, produced at the trial, and that the city engineer, under proper instructions from plaintiffs, approved of the plan, and by appending his signature thereto gave the consent contemplated by the legislature. Plaintiffs have not sustained any damage by the acts of defendants.

As the injunction sought is to prevent a repetition of the acts complained of, I must refuse it, since these acts were quite within the powers of defendants to commit. Further, I am not satisfied, having regard to the proceedings herein, that defendants contemplate the invasion of any of the plaintiffs' rights.

---

## NORTH-WEST TERRITORIES.

### (EASTERN ASSINIBOIA.)

WETMORE, J. JUNE 5TH, 1905.

TRIAL.

### LILLIE v. THOMAS.

*Chose in Action—Assignment of—Action by Assignee—Claim for Damages by Defendant — Set-off — Counterclaim — Consideration—Notice.*

Action upon two agreements in writing alleged to have been made by defendant whereby he promised to pay Scott, Lawton, & Holland, or order, the sums of $250 and $500 respectively, which agreements were alleged to have been assigned and transferred in writing by Scott, Lawton, & Holland to plaintiff, and that notice of such assignment had been given to defendant. It was also alleged that no payment whatever had been made on these agreements. It was not alleged that they were negotiable instruments. Defendant by his statement of defence set up that the agreements in question were given for the purchase price of a breeding stallion sold by Scott, Lawton, & Holland to defendant, under representations that such stallion was a sure foal getter, and under the written agreement of the vendors that if he should during the season of 1903 fail to get 50 per cent. of the mares

Digitized by Google

covered by him in foal, the vendors would replace this stallion with one equally good and accept back the stallion sold in the first instance; that this stallion was purchased by defendant, to the knowledge of the vendors, for the purpose of serving and getting in foal mares of defendant, and for being travelled and getting in foal mares of others for hire; that defendant procured a number of mares to be served by this stallion during the season of 1903, but he failed to get in foal 50 per cent. of such mares or any of them; that immediately after the season of 1903 defendant, pursuant to the terms of the agreement, assigned to the vendors the book accounts for the mares so served, but the vendors had been unable to collect anything on account of such accounts, as the vendors well know, because none of the mares were got in foal; that defendant on or before 1st February, 1904, for the first time learned that the stallion had failed to get any mares in foal, and so notified plaintiff and the vendors, and demanded of plaintiff and the vendors to replace the stallion by another one and to accept the first stallion back, but plaintiff and the vendors refused to replace such stallion by another one or to accept him back. It was also set up that defendant has had no notice of the assignment of the agreements sued on to plaintiff, and also that there was no consideration for the assignments or either of them; also that defendant only used the stallion during the season of 1903, and that on account of his failure to get mares in foal he was and always had been of no value to defendant, and he claimed to set off against plaintiff's claim damages, which by his particulars he fixed at $1,725. Defendant also objected to plaintiff's right to recover interest on the $500 after maturity at any greater rate than 5 per cent. Defendant also counterclaimed for $1,725 damages, repeating the paragraphs of the statement of defence.

Objection was raised in the replication that the matters contained in the statement of defence did not constitute and were not properly pleadable as a defence to plaintiff's claim, but that they constituted, if anything, only a right of action against the vendors, Scott, Lawton, & Holland; and plaintiff also objected that the allegations contained in the counterclaim did not constitute any right of action or ground for relief against plaintiff, but, if anything, they constituted only a right of action against the vendors.

Digitized by Google

This question of law was, on the application of plaintiff, set down for hearing under Rule 149 of the Judicature Ordinance.

J. T. Brown, Moosomin, for plaintiff.

E. L. Elwood, Moosomin, for defendant.

WETMORE, J.:—It was urged that this matter relied upon by defendant is not a set-off at all, but can only be raised by way of a counterclaim, and sec. 4 of ch. 41 of the Consolidated Ordinances, respecting choses in action, was relied on. That section provides that "in case of any assignment of a debt or chose in action arising out of contract and not assignable by delivery, such assignment shall be subject to any defence or set-off in respect of the whole or any part of such debt or chose in action arising out of contract existing at the time of the notice of assignment to the debtor or person sought to be made liable, in the same manner and to the same extent as such defence or set-off would be effectual in case there had been no assignment thereof, and such defence or set-off shall apply as between the debtor and any assignee of such debt or chose in action arising out of a contract." It was contended that under that section a counterclaim could not be set up by way of defence against an assignee of a debt. In Waterous Engine Works Co. v. Ball, decided by me on 2nd March, 1903, I made a distinction between a set-off and a counterclaim, and relying upon what was laid down in the Annual Practice of 1903, at p. 275, I drew the conclusion that a set-off can only arise where the action is for a liquidated amount, and that a claim sounding in unliquidated damages could not be set off against a claim for debt or for any other cause of action. I have not altered my opinion in that respect as to the general distinction between a set-off and a counterclaim, but, in so far as the right of a party sued by the assignee of a debt to set up a claim sounding in damages and arising out of or in connection with the same contract out of which the debt arose as a defence to an action by the assignee of the debt, I feel I am precluded by what was decided in Government of Newfoundland v. Newfoundland R. W. Co., 13 App. Cas. 199. The Court lays down at p. 213 that "unliquidated damages may now be set off as between the original parties and also against an assignee if flowing out of and inseparably connected with the dealings

Digitized by Google

and transactions which also gave rise to the subject of the assignment." That is the case here. I have not lost sight of the fact that the English enactment which allows the legal right to a debt or chose in action to pass by assignment in writing to a third person, namely, sec. 25, sub-sec. 6, of the Imperial Judicature Act, 1873, is quite different from the Ordinance which I have hereinbefore referred to, especially in the fact that the express language of that enactment makes the assignment "subject to all equities which would have been entitled to priority over the right of the assignee if the Act had not been passed," and I am inclined to think that the Court in the case in 13 App. Cas. had that enactment in their minds. Nevertheless the judgment does not appear to go solely on that ground. It went also upon the ground that the Province of Newfoundland had made an enactment similar to Rule 3, Ord. 19, of the Eng. Rules of Court, which provides that "A defendant in an action may set off or set up by way of counterclaim against the claims of the plaintiff any right or claim, whether such set-off or counterclaim sound in damages or not." Now, we have in the Territories the same Rule word for word. (See Rule 110, Jud. Ord.) The decision also goes upon the inequitable consequences that would follow if it had been otherwise decided than as laid down there. I repeat, that whatever my own opinion may be I must follow that case. What was laid down in Young v. Kitchen, 3 Ex. D. 127, was approved of in that case. That decision lays it down that a defendant in a case like the present has no claim to recover anything against the plaintiff. He only meets the plaintiff's claim by a counterclaim of damages arising out of the same contract. That is, to use the expression attributed to Cockburn, C.J., by the author of the Annual Practice, 1905, at p. 287, "The matter can only be used as a shield, not as a sword," or, in other words, that it serves only as a defence and is not a cross-action. The matter set up by the defendant, therefore, affords a good defence, and in my opinion is properly pleaded as a defence. But, according to the decision in Young v. Kitchen, the defendant is in error in claiming damages from the plaintiff to the amount of $1,725, as he can only as against the plaintiff claim to the amount of the plaintiff's alleged claim under the agreements—for anything over and above that he must have recourse to Scott, Lawton, & Holland; and in so far as this action is concerned I will follow the course adopted

Digitized by Google

in Young v. Kitchen, that is: I will hold the 1st, 2nd, 3rd, 4th, 5th, 8th, 9th, and 10th paragraphs of the statement of defence good except as to the claim for damages. The defendant will be at liberty to amend his defence, by shewing that he does not claim to recover damages against plaintiff, but only to set them off against plaintiff's claim. In view of my ruling that this is a matter of defence, to the extent specified the counterclaim will be struck out, and is ordered to be struck out accordingly. As to the 6th paragraph of the statement of defence, that defendant has had no notice of the assignments or either of them, it is set up that no notice is necessary in order to vest the right of action in the plaintiff. I am inclined to that view of the question, but I express no decided opinion, as it does not lie in the mouth of plaintiff to set that up, because he has averred notice in his claim, and if he chose to aver immaterial matter he cannot complain if the other party sees fit to traverse it. As to the 7th paragraph of the statement of defence, that there was no consideration for said assignments or either of them, I am of opinion that that is immaterial and affords no defence, and I will therefore order it to be struck out.

In all the circumstances of this case, I will follow what was laid down in Young v. Kitchen, and make the costs of this application and of the hearing costs in the cause to each party, and the order will be drawn accordingly.

---

## NORTH-WEST TERRITORIES.

### (WESTERN ASSINIBOIA.)

NEWLANDS, J. JUNE 7TH, 1905.

TRIAL.

## NEW HAMBURG MANUFACTURING CO. v. KLOTZ.

*Sale of Goods—Action for Price— Collateral Oral Agreement —Condition Precedent—Waiver—Acceptance — Part Performance — Consideration—Warranty—Failure to Return Goods.*

Action for the price of one maple bay wind stacker, one chaff blower, and 36 feet of rubber belt. The defence was "that

Digitized by Google

it was agreed between the parties that the plaintiffs should fit the wind stacker and chaff blower to the defendant's threshing machine and fix the same in their respective places and make the same work to the satisfaction of the defendant, and that if they did not do so the defendant should not be required or compelled to pay for the same or any portion thereof, and should be released and discharged from all obligation in respect thereof, that the plaintiffs have never so fixed the said machinery or any part thereof to the defendant's separator, but on the contrary have neglected and refused and still neglect and refuse so to do, and the defendant is thereby discharged and released from all obligation or liability in respect thereof.

R. A. Carman, Balgonie, for plaintiffs.

A. D. Dickson, Qu'Appelle, for defendant.

NEWLANDS, J.:—The machines were sold under a written agreement signed by defendant, which did not contain the condition pleaded. The following was the only warranty on the part of plaintiffs therein:

"Warranty.—All machines manufactured by us are warranted to be well built, of good material, and capable of doing good work when properly operated. During the first season should any breaks occur through defective material or workmanship we will replace the broken part free of charge. If when started the machine should be in any way defective and not work well, the purchaser should give notice promptly to us or the agent from whom he purchased, and reasonable time allowed to remedy the defect, if any, with the purchaser's necessary and friendly assistance, when if it cannot be made to do good work it will be replaced by a new machine. Failure to give immediate notice as above or continued possession of the machine, whether kept in use or not, shall be deemed conclusive evidence that the machine fills the warranty. No agent has any authority to add to, abridge, or change this warranty in any manner."

From the evidence given at the trial, I am of the opinion that the agreement pleaded by the defendant is not a verbal alteration of a written contract, but, as was held in Morgan v. Griffiths, L. R. 6 Ex. 70, is collateral to the written agreement, and upon the strength of it the written agreement was entered into, and the performance of it was a condition pre-

Digitized by Google

cedent to the defendant's promise to pay. The defendant's threshing machine was a J. I. Case threshing machine, and plaintiffs' machines were manufactured by themselves, and the evidence shewed that the maple bay wind stacker would only work properly on a Case thresher when certain changes had been made which they were going to make in this case, but which were not made before the commencement of this suit.

The chaff blower included in the agreement between the parties was sold on the same conditions, and the plaintiffs' agent when he tried to put it on defendant's thresher found it could not be put on it, so it was never used by defendant, and at the trial the plaintiffs abandoned their claim for the price of it. As the contract was, in my opinion, a divisible one, the fact that the chaff blower would not fit defendant's thresher does not affect the remainder of the claim.

Plaintiffs' agent attached the wind stacker to defendant's thresher, and he used it one season, although it did not work at all satisfactory on account of a broken wheel and because the alterations required were not made. Plaintiffs had notice of these facts, and whether that notice would be sufficient under the agreement or not does not matter, as it was accepted by them. Defendant in his evidence states that plaintiffs in putting the wind stacker on his threshing machine, cut off a part of the machine, which prevented him from putting on the former apparatus he had for stacking, when he found the wind stacker would not work, so that he was obliged to use it in order to continue threshing.

Defendant had not pleaded a breach of warranty in reduction of damages, nor has he counterclaimed therefor, and no evidence was given at the trial as to the amount of damage he had sustained; he relied solely on the fact that the condition precedent had not been performed, and that therefore he could not be called upon to comply with his promise.

The reason the alterations were not made as agreed are given by plaintiffs' witness Cockerill, who was the expert for them. He says that the first time he went down defendant was away, but he took a note of what was needed to put the wind stacker in shape, and that he went down a few days later and took with him the necessary parts to make it work. It was very cold weather, defendants had finished threshing, and, as he would have to go back again to put it in shape, he thought it no use to fix it then. The witness Blair, the agent

Digitized by Google

who sold the wind stacker, was also down on this occasion. He says: "We went to repair the blower (the witnesses referred to the wind stacker all through their evidence as a blower). We took it apart to fix it up. It was late, and we had hardly time to get back home. We told him that if he would give a settlement for it we would not ask him any money, but if he would give a settlement we would put the blower in shape before next threshing season. He said that was what he wanted, he would not settle before it was running next year." Both these witnesses also stated that it was not fixed the next year because the defendant had purchased another wind stacker from another man and was using it, and there was therefore no use of their going down to fix it. The defendant in his evidence stated that he waited until just before the commencement of the threshing season,and, as plaintiffs had not fixed the wind stacker as they had promised, he purchased another machine.

In Williams's note to Pordage v. Cole, 1 Wms. Saunders 320, the following rule is laid down: "When a day is appointed for the payment of money, etc., and the day is to happen after the thing which is the consideration of the money, etc., is to be performed, no action can be maintained for the money, etc., before performance." This rule is also mentioned in 2 Smith's Leading Cases, p. 13, in the notes to Cutter v. Powell, and a large number of cases are cited in support of it.

The alteration of this wind stacker so that it would work properly in connection with defendant's threshing machine was, as I have found, a condition precedent, and, as this has never been done, plaintiffs cannot under the above rule recover unless defendant has waived the condition.

If a man offers to perform a condition precedent in favour of another, and the latter refuses to accept the performance, or hinder or prevent it, this is a waiver, and the latter's liability becomes fixed and absolute: Benjamin on Sale, 3rd ed., p. 842. There was no offer to perform the condition in this case. It should have been performed a reasonable time before the threshing season commenced, and, if the defendant waited until a reasonable time before the season opened for the performance of the condition by plaintiffs, nothing having been done by them, he would, I think, be entitled to consider that they were not going to perform the condition and that the contract between them was at an end. Therefore I

Digitized by Google

do not think the purchase by him of another wind stacker was a waiver of the condition that they were to attach it to his threshing machine and make it work satisfactorily.

But it is contended by plaintiffs that defendant accepted the wind stacker by using it through the season of 1903, and, even although they did not fix it as agreed, he had received and accepted a substantial part of what was to be performed in his favour, and that if there was any condition precedent its character was changed, and it became a warranty, which would oblige him to perform his part of the agreement, and, as he had not pleaded the breach of warranty in reduction of damages, or counterclaimed, they should recover.

There may, however, be cases of a part performance where the defendant may still be at liberty to say that the plaintiff is not entitled to recover the contract price. Such a case is pointed out by Bramwell, B., in White v. Beeton, 30 L. J. Ex. 373. "Suppose," he says, "the guardians of a union contracted with a man to supply bread for the house, say 100 loaves per day for three months, it would be preposterous to suppose that if he did it for every day with one exception, in which he supplied 99 only, he would not be entitled to the contract price. Suppose he delivered them on the first day and not afterwards, is he then to be paid the contract price? That is equally unjust. It seems to me the parties who would have the 100 loaves for one day might reasonably complain that a new contract should be forced upon them by reason of the breach of the other party, and they might say, 'as to our retaining the things we cannot help it, for the loaves are consumed.'" This is also laid down by Blackburn, J., in Post v. Dowie, 32 L. J. Q. B. 181, and by Pollock, C.B., in Groves v. Legg, 23 L. J. Ex. 231, and other cases.

But this part performance must be a substantial part of the consideration. In Heilbutt v. Hickson, L. R. 6 C. P. 451, Bovill, C.J., says: "In some cases, however, such as where the goods are utterly valueless, the dealing with them by the purchaser has been held not to affect his right to reject and to refuse to pay anything for them; as in Poulton v. Lattimore, 9 B. & C. 259, where the purchaser had sown some and sold other part of certain clover seed which had been warranted as new growing seed, but the whole of which turned out to be totally unproductive and useless."

In this case the acceptance of the defendant was conditional on the plaintiffs fixing the wind stacker as agreed,

Digitized by Google

and he was compelled to use it for the time he did because plaintiffs' agent had so altered his threshing machine that he could not use his own apparatus. He used it not because he wanted to, but because their action compelled him to. During the time he so used it, it was of very little value to him on account of numerous stoppages to fix it, and because he required an extra man to do the work the machine should have done.

I think from all the evidence that the wind stacker was of no practical value to him and that he did not receive such a substantial part of the consideration as would turn the condition precedent into a warranty, which would compel him to pay for the wind stacker and look to plaintiffs for the damages he suffered.

It is also contended by plaintiffs that the machine is still at defendant's place and has never been returned to them. Under the authority of Heilbutt v. Hickson, above referred to, I think that defendant had the right to throw it on to plaintiffs' hands there, and was under no obligation to return it to them.

As to the belting, no evidence was given as to its being delivered to defendant, so I presume plaintiffs dropped that part of their claim also.

I therefore give judgment for defendant with costs.

---

## NORTH-WEST TERRITORIES.

### (EASTERN ASSINIBOIA.)

WETMORE, J. JUNE 10TH, 1905.

TRIAL.

### PEARCE v. HART.

*Detinue — Animal — Evidence of Identity — Misdescription—Amendment.*

Action for the detention of a colt alleged to be the property of plaintiff.

H. A. Robson, Winnipeg, and W. R. Parsons, Yorkton, for plaintiff.

E. L. Elwood, Moosomin, and Giffard Elliott, Yorkton, for defendants.

Digitized by Google

WETMORE, J.:—The statement of claim describes the animal as a gelding, but as a matter of fact it was a stallion. At the trial it was contended that, as the animal was described as a gelding and there was no proof of the taking or conversion of such an animal, judgment should be given for defendant. I am of opinion that were it not for the 2nd paragraph of the statement of defence, and for the counterclaim, which is the 4th paragraph of that defence, and the 3rd paragraph of plaintiff's reply, that contention might prevail unless an amendment was ordered. It is a case in which I would have no hesitation in ordering an amendment, because there is no doubt as to what animal was in dispute between the parties. No one has been misled. The facts are that plaintiff owned a bay stallion colt, and defendants owned a bay stallion colt, both of which animals were let out to range over the prairie, and the question is which of the parties to this action is the owner of the colt in question? Perhaps, in order to prevent difficulties arising hereafter, it will be advisable to amend the statement of claim, and I order that it be amended accordingly, by changing the word "gelding" wherever it occurs to the word "stallion." I do not know that this amendment is necessary, because the 2nd paragraph of the statement of defence denies that "the defendants took possession of any gelding of the plaintiff's, or of any horse whatever belonging to him;" and the 4th paragraph of the counterclaim, referred to, alleges the seizing and taking of a light bay stallion, the defendant alleging it to be his gelding; and the 3rd paragraph of the reply sets up that "the light bay stallion referred to in the defendant's counterclaim is the same animal referred to in the plaintiff's statement of claim." So it is quite clear that, as I have before said, no person has been misled. However, to prevent any question arising hereafter in that matter, I will order the amendment as stated.

As to the right of property; the evidence is of a most contradictory character; a number of persons called as witnesses are quite satisfied that the animal is the property of plaintiff; others, that it is the property of defendant. This is just the trouble that is apt to arise when persons turn animals of this kind loose upon the prairie without taking the precaution to brand them. The evidence seems to be very evenly balanced between the parties, and I have had great difficulty in arriving at a conclusion, but on full consideration I have reached the conclusion that the weight of evidence establishes the property to be the property of plaintiff. I have reached this conclusion largely upon the ground that the weight of evidence is in the direction that the colt which defendants owned was differently marked on

Digitized by Google

the face from the colt in question. We have the testimony of John Pearce, Tait, George Gilbert, and Cherry in that direction, and we have the testimony of Frank Sherwin that when one of the defendants took the colt from Beatty's he stated that he did not think that his colt had as much white on his face as this animal had. This evidence is uncontradicted. There is other testimony which goes to point in the same direction, for instance, the statements made to the Moores as the defendants were going into Yorkton. I am of opinion that the testimony of the Moores in that respect is worthy of credit; they seem to be respectable people and gave their testimony in a way which impressed me, and I believe they were telling the truth. The judgment will be for plaintiff both on the claim and the counterclaim for $2 damages, and costs both of the claim and counterclaim. There will be one taxation of costs.

---

## NORTH-WEST TERRITORIES.

### (EASTERN ASSINIBOIA.)

WETMORE, J. JUNE 10TH, 1905.

TRIAL.

### McNICHOL v. BRUCKS.

*Sale of Goods—Delivery—Change of Possession — Animals —Visible and Public Charge—Conversion—Dispute as to Ownership—Costs—Scale of—Set-off.*

Action for taking and detaining 7 cows and a calf alleged to be the property of plaintiff.

E. L. Elwood, Moosomin, and J. F. MacLean, Yorkton, for plaintiff.

H. A. Robson, Winnipeg, and W. R. Parsons, Yorkton, for defendant.

WETMORE, J.:—I find the following facts. Joseph S. Walters and Joseph Z. Walters, who were in partnership as butchers under the name of "Walters & Walters," purchased some 20 head of cattle from defendant, among which were the animals in question in this cause, and those animals so in question were brought by the Walters and placed in a pasture field a short distance from Yorkton, which the Walters had rented from one Pachal, and on which was their

Digitized by Google

slaughter-house. Plaintiff had contemplated going into partnership with these men, and paid to them for that purpose something like $205. Either the partnership was never completed or plaintiff made up his mind to retire—it does not matter which. He desired to withdraw the money he had paid into the concern, and in consideration of that and some further consideration, which it is not necessary to express, the Walters sold him the cattle in question. There is no dispute as to the value of these cattle, they were put at $185. The only delivery made was that the Walters went to the pasture field before mentioned in which the cattle were, and said, "Now, the cattle belong to you, John, and you have got to look after them." On the same day one Klump purchased Walters out, including an assignment of the lease of the pasture field which they had from Pachal. On the day following plaintiff went to Klump, who was in possession of the pasture field, and asked for and obtained from him permission to leave the cattle there, and from that time plaintiff and Klump, at plaintiff's request, and a man of plaintiff's, looked after the cattle, that is, they gave them what attendance they required, which it seems was to do nothing more than water them. The Walters from the time of the sale to plaintiff had nothing whatever to do with the cattle, and did not look after them in any way whatever. The defendant had not been paid in full for the animals that he sold to Walters; $185 of the purchase money remained unpaid, and he took from Joseph S. Walters his note for that amount. This, of course, was after the cattle had been taken by the Walters and placed in the pasture field. About the 18th or 19th October defendant was informed by Joseph S. Walters that he was unable to pay what remained due upon these cattle, and offered to allow him to take them back. This was assented to by defendant, and Joseph pointed out where the cattle were. It was arranged that Joseph's note for $185 was to be returned to him. I hold this to be a sale of the cattle. I may say that I utterly disbelieve Joseph's version of this part of the transaction, and I further say that I place very little confidence in the testimony of this man. Brucks went to the bank, where this note was, and obtained it, and endeavoured to hunt Joseph up to deliver it to him, but he could not find him. He did, however, deliver the note to Joseph some 3 weeks or so afterwards. On the day on which this arrangement was made for the re-delivery of the cattle, defendant with his hired man went to the pasture field in question and took the cattle away; this is the trespass complained of. At the conclusion of the trial no question was raised as to the bona fides of the sale by the Walters to plaintiff. It was questioned that there was a re-purchase by

Digitized by Google

defendant; I have already held there was. It was also urged on the part of plaintiff that defendant, before he made this re-purchase, had notice of the sale to plaintiff. In the view I have taken of this case, the whole question narrows down to whether the sale and delivery to plaintiff was accompanied by an actual and continued change of possession. It is very doubtful whether in such circumstances the fact that defendant had notice of the sale to McNichol would be material, but I find as a matter of fact that he had no notice of this sale until after he had moved the property from the pasture field. It was not set up that the sale to plaintiff was not accompanied by immediate delivery, but it was urged on the part of defendant that it was not followed by an actual and continued change of possession of the animals in question, and Doyle v. Lasher, 16 C. P. 263, was cited in support of that contention. That authority does not seem to me to support defendant's contention. There, there was no change of possession at all; all that was done was to mark the sheep and move them from one field belonging to the vendor to another field belonging to him. The question of change of possession is one of fact; that is well established by the authorities. I have, I must say after considerable hesitation, arrived at the conclusion that there was an actual change of possession in this case. In doing this I have not lost sight of what was laid down in Danford v. Danford, 8 A. R. 518, namely, that "in order to create a change of possession under the statute there must be such a change as would be visible and apparent to the public." In the case now under consideration, although the cattle remained in the same pasture field that they were in when the contract of sale was made, the possession of that pasture field had passed out of the vendor, in whom it was at the time of the sale, into the hands of a third person, and that third person at the request of the vendee, the plaintiff, had given him the privilege to keep the cattle there, was retained to look after them to some extent, and in so far as the real looking after them was concerned they were looked after by plaintiff and his employees, and the vendors, the Walters, never went back there at all. They therefore passed out of the possession of the vendors and into the actual possession of the vendee, and they could not in any sense that I can conceive of be considered in such circumstances in the possession of the vendors, and therefore they must be considered in the actual possession of the vendee. I think that this was a change that would be visible and apparent to the public; the public would see that the vendors were no longer looking after them, but that the vendee was doing so. This is all that it is necessary to decide for the purpose of this case, and there must be judgment for plaintiff for $190 and

Digitized by Google

costs. In arriving at this amount I valued the property at $185, and allowed interest from the date of sale.

Plaintiff will only be entitled to costs on the lower scale, as he has not recovered $200. The clerk will act under item 95 of the tariff, and tax defendant's costs of defence, and set off the excess against plaintiff's costs as provided in that item. I may say that I am quite at a loss to understand why advocates will so persistently bring actions on the higher scale which clearly and palpably ought to be brought on the lower, as in this case. The value of the property in dispute was $185, fixed upon by the very written instrument under which plaintiff claims, and why in the world they should have asked for damages for $300 I am quite at a loss to understand. The only way to stop operations of this sort is to insist in every case where it is done that this item 95 shall be acted on. That is the intention of the item, and I for one do not feel disposed in the exercise of any discretion I may have to relax it in any way unless some very plain exceptional circumstances are made apparent.

---

## NORTH-WEST TERRITORIES.

### (EASTERN ASSINIBOIA.)

WETMORE, J. JUNE 10TH, 1905.

TRIAL.

### DAKOTA LUMBER CO. v. RINDERKNECHT.

*Limitation of Actions — Promissory Notes — Covenant in Mortgage Made in Foreign Country—Foreign Land—Sealed Instruments—Law of Foreign Country—Foreign Judgment—Jurisdiction—Defendant Resident in Territories—Subject of Foreign State—Allegiance—Natural Justice—Purchase of Mortgaged Land by Plaintiffs.*

Action on two promissory notes made by defendant in favour of plaintiffs, dated 13th February, 1890, and payable respectively on 1st October, 1890, and 1st October, 1891; also upon an alleged covenant contained in a mortgage bearing the same date, made by defendant in favour of plaintiffs, to secure the amount payable under the two notes, upon land situated in South Dakota. The alleged covenant was for payment at the same time that the notes were made payable. The action was also brought upon a judgment for $490 recovered in the 5th Judicial Circuit Court for the State of South Dakota.

Giffard Elliott, Yorkton, for plaintiffs.



Digitized by Google

H. A. Robson, Winnipeg, and W. R. Parsons, Yorkton, for defendant.

WETMORE, J.:—I find that the notes in question were signed by defendant, but that recovery upon these notes is barred by sec. 1 of ch. 31 of the Consolidated Ordinances, respecting limitations of actions in certain cases. No question arises with respect to this, because the right of action is barred not only by that Ordinance, but also by the law of the State of South Dakota. A question was raised whether the alleged covenant was a covenant at all. The mortgage was made in the State of South Dakota, and the land pledged was situated there. The mortgage was made by Rinderknecht and his wife, and it sets forth that the parties thereto had set their hands and affixed their seals thereto, and the attestation clause sets forth that it was "signed, sealed, and delivered in the presence of" certain witnesses who have signed their names to it; but the only seal on the document is a printed scroll that was put on it by the printer opposite to where it was intended that the parties should sign it, and these parties have signed opposite to these scrolls. The only way they constituted these scrolls their seals was by signing the instrument. They acknowledged them to be their seals in no other way. It was contended that this was not a sealed instrument, and therefore that the alleged covenant was no covenant at all. It was established by the evidence that this constituted a sealing according to the laws of South Dakota, and that the covenant contained in this mortgage was a covenant according to the laws of that State. I am inclined to the opinion that the law of the country where the contract was made or the instrument was executed must govern, but I express no decided opinion upon that question because it is not necessary. I have come to the conclusion that the right of action in so far as this covenant is concerned is barred by sec. 8 of the Real Property Limitation Act, 1874, being the Imperial Act 37 & 38 Vict. ch. 57, which is made of force in the Territories by virtue of the sec. 2 of the Ordinance above mentioned. This action was commenced on 25th October, 1904, and therefore more than 12 years had then elapsed since the moneys secured by the mortgage and the covenant became payable. Under the law of South Dakota the Statute of Limitations only barred the right of action upon a covenant after the expiration of 20 years from the time the money became payable. The question, and the only question, raised in so far as the right of action under the covenant is concerned is whether the Dakota statute applies here or whether 3 & 4 Wm. IV. ch. 42, sec. 3, applies, or the Imperial Real Property Limitation Act, 1874. I hold that the Dakota

Digitized by Google

law does not apply here. Don v. Lippmann, 5 Cl. & F. 1, is decisive upon that point in so far as the Statute of Limitations is concerned. . . ." As to sec. 8 of the Real Property Limitation Act, 1874, being applicable, I refer to Kirkland v. Peatfield, [1903] 1 K. B. 756, in which the action was brought to recover principal and interest due under the covenant in the mortgage deed. It was held that that section "applies to an action by a mortgagee against a mortgagor on his covenant, as well as to the other remedies of the mortgagee." And that judgment follows Sutton v. Sutton, 22 Ch. D. 511. Defendant therefore is entitled to judgment in so far as this action is based upon the promissory notes and the covenant.

The only remaining question is whether the plaintiffs are entitled to recover upon the judgment recovered in the South Dakota Court. I find the following facts under the evidence: The defendant was a resident of Brittan, South Dakota, at the time he executed the promissory notes and the mortgage in question. The judgment in question was recovered in that Court against defendant. That Court is a court of record. The action was brought upon the mortgage above referred to, and the judgment following the prayer of the claim ordered and decreed that the mortgaged premises be sold to raise the amount of principal and interest, etc., due thereunder; that the Referee to whom the matter had been referred to sell the property made his report; that the report was approved and confirmed; and that plaintiffs recovered a deficiency judgment against defendant for $490, and had execution therefor. This judgment was in accordance with the practice of that Court. The only amount realized from the sale of the land was $50, which was credited on the amount payable under the decree, and plaintiff got judgment for the difference, being the $490 above specified. The first question that arises is whether that Court had jurisdiction to award this judgment so that it could be recognized by the Courts of the North-West Territories. Defendant was born in the State of Wisconsin, in the United States, and resided in the United States until he moved to this country. He resided in Brittan, South Dakota, for some years prior to the execution of the mortgage in question. His father was a German and his mother was Irish. He came to this country about 14 years ago and has resided in Yorkton ever since, and during all that time has not been out of the Territories. He was personally served with the summons in the action brought in the Dakota Court, and such service was effected according to the practice of that Court. Defendant did not appear to the action and therefore judgment went against him by default. In the Am. & Eng. Encyc. of Law, 2nd ed., vol. 2, p. 148, is set forth what constitutes allegiance; it says: "Alle-

Digitized by Google

giance is of four kinds, namely: 1. Natural allegiance—that which arises by nature and birth." It goes on to state what the other kinds of allegiance are, but it is unnecessary to specify them for the purpose of this case. In the note on the same page it is said: "Natural allegiance is such as is due from all men born within the King's dominions, immediately upon their birth, for immediately upon their birth they are under the King's protection." I have not been able to lay my hands upon any other authority, if this may be called an authority, on the question of allegiance or as to what constitutes allegiance, but this is in accord with what my understanding of it is. What would constitute natural allegiance in the British Dominions would constitute natural allegiance in the United States. Defendant, therefore, was by natural allegiance a subjct of the United States. It was urged that this judgment was not binding upon defendant in this country because at the time the action was commenced and for many years previous thereto he was not a resident of South Dakota, but was a resident of these Territories, and that he had not submitted to the jurisdiction in any way. This would be correct beyond all question if defendant was a foreigner and not a subject of the United States. Quoting again from the Encyclopædia above mentioned, "Natural allegiance he (Blackstone) says is perpetual." Unless something is established to the contrary, therefore, defendant being a natural born subject of the United States remains so. Possibly if he has been naturalized a British subject since coming to Canada, there may be treaty relations between Great Britain and the United States which would release him from his citizenship to the United States. No such treaty has been brought to my notice, but, assuming there was such a treaty, it is not necessary for me to decide what the effect of it would be in this respect, because it has not been established to my satisfaction that defendant ever was naturalized in Canada. It was urged that the fact that he had held the office of councillor of Yorkton and had voted at the elections was prima facie evidence that he had been naturalized here. That to my mind is not sufficient. It is true that the defendant swore that he took out naturalization papers, but on cross-examinaion it clearly appeared that he was not in a position to swear to that fact. He never saw the certificate of naturalization. All that he would swear to was that he instructed an advocate to prepare the papers and take out a certificate, and that he swore to the necessary papers for that purpose. If as a matter of fact he was naturalized it would have been very easy to have established that fact through the office from which the certificate of naturalization issued. I therefore hold the defendant still to be a subject of the United States.

Digitized by Google

It was further urged that assuming him to be a subject of the United States the South Dakota Court had no jurisdiction. Deacon v. Chadwick, 1 O. L. R. 346, and Sirdar v. Faridkote, [1894] A. C. 670, were relied on as part of that contention. Deacon v. Chadwick seems to support that contention, and that case was decided by an exceedingly strong Court, but if it is intended to lay down that a foreign Court has not jurisdiction in an action of this sort over a person owing allegiance to the country in which the Court exercises its jurisdiction, if such person resides in Canada, I am, with great respect, unable to follow it. The authorities are, in my opinion, all the other way. I will refer to some of them and take them up in their order. . . .

[Reference to Douglas v. Forest, 4 Bing. 686; Cowan v. Braidwood, 1 M. & G. 882; Schibsby v. Westenholz, L. R. 6 Q. B. 155; Rousillon v. Rousillon, 49 L. J. Ch. 338.]

I may say that in these cases the party sued had not submitted to the jurisdiction of the Court by appearing. Sirdar v. Faridkote, cited as an authority for defendant, does not, in my opinion, bear out his contention. In that case the defendant was not and never had been a subject of Faridkote, but he was a subject of the State of Jhind, where he was when he was served with the process, and where he had been ever since leaving Faridkote; and, while the Court held that the judgment was not binding in the Court of the Assistant Commissioner of Lahore, it intimated in the course of the judgment that where the defendant owed allegiance to the State in which the Court delivering the judgment was, it would be binding. . . . And that the Court would have jurisdiction where the defendant owed allegiance to the State in which the Court exercised its jurisdiction, is also held in Fowler v. Vail, 4 A. R. 267.

It was set up, however, that the judgment was contrary to natural justice because the property had been sold under the decree, and was purchased on behalf of the plaintiffs. In the first place the evidence does not establish that to be the case. It is true it was purchased by the president of the plaintiff company, but it is by no means clear that this purchase was for the benefit of the company. But, supposing it was for the benefit of the company, the evidence establishes that it is the practice in the Courts of South Dakota for the plaintiff in a foreclosure suit to purchase the property in. Now, I can discover nothing in this which is contrary to natural justice. I know that in Canada it is not allowable without the leave of the Court, but on application and leave of the Court obtained it is allowable; so much is that so that the application for leave appears to me to take upon it rather the character of a farce. I have known in my experience

Digitized by Google

both as Judge and while practising at the Bar a number of cases where mortgaged property was sold on foreclosure proceedings, and in every instance it was usual to apply for leave for the plaintiff to bid, and I never knew it to be refused. It seems to me that it is quite a prudent step to take to enable the plaintiff to protect his security, and I see nothing contrary to natural justice in the practice being adopted in South Dakota by which a plaintiff has leave to bid as a matter of course and without application to the Court. It was also urged here that the property was purchased for a great deal below its value; that was not established either. It seems that there was a prior mortgage upon the property, and the testimony is that $50 was more than the equity of redemption was worth in such circumstances.

There will be judgment therefore for plaintiffs on the issues joined to the 1st, 2nd, 3rd, 4th, and 5th paragraphs of the statement of defence, for $490, and the general costs of the action. There will be judgment for defendant on the issues joined to the 6th and 8th paragraphs of the statement of defence and on the 2nd paragraph of the replication, with costs solely applicable to such last mentioned issues. There will be one taxation of costs, and one judgment will be set off against the other, and plaintiff will have execution for the balance remaining after such set-off.

---

## NORTH-WEST TERRITORIES.

### (WESTERN ASSINIBOIA.)

NEWLANDS, J. JUNE 19TH, 1905.

CHAMBERS.

### RE ALBERTA DOMINION ELECTION.

*Parliamentary Elections—Controverted Election Petition—Preliminary Objections—Status of Petitioners—Evidence of—Voters' List—Certified Copy—Notice under Canada Evidence Act—Oral Testimony of Petitioners—Notice of Presentation of Petition and Security—Clerical Error—Copy of Certificate of Registrar of Court—Receipt—Service—Deposit—Bank Notes—Evidence—Payment of Cost of Publication of Petition—Credit—Affidavit Verifying Petition—Proof that Election Held—Allegations of Illegal Acts by Enumerators and Deputy Returning Officers.*

Hearing of preliminary objections to petition to avoid the election of respondent as member for Alberta in the House of Commons.

Digitized by Google

H. M. Howell, K.C., and T. C. Johnstone, Regina, for petitioners.

A. J. Andrews, Winnipeg, Ford Jones, Regina, and J. F. L. Embury, Regina, for respondent.

NEWLANDS, J.—At the hearing of the preliminary objections the petitioners were called and gave evidence that they were British subjects by birth and had resided in the North-West Territories and in the electoral district of Alberta for more than a year prior to the issue of the writ for the election, and that they were not in any way disqualified to vote and had voted at that election. There was also produced and put in evidence a copy of the voters' list for polling division No. 51 for said electoral district, and the petitioners identified their names thereon. This list was certified to by the Clerk of the Crown in Chancery under his official seal as being "a true copy of the list of voters of polling sub-division number 51 of the electoral district of Alberta, which remains on record in my office, and which said list was returned to me by the returning officer for the electoral district of Alberta as the very list used by the deputy returning officer at said polling division at and in relation to an election of a member of the House of Commons of Canada for the said electoral district, holden on the 27th day of October and the 3rd day of November, A.D. 1904, and held pursuant to a writ of election issued therefor and dated the 29th day of September, A.D. 1904, and which said original list of voters was returned to me by the said returning officer for the said electoral district in the same plight and condition as it now appears, and said original list of voters is now on record in my office."

Before this list was put in, a notice under the Canada Evidence Act was proved of the intention of the petitioners to put in said certified copy. This notice was served on the respondent's advocate 10 days before the hearing, and service was admitted by him.

To this evidence the respondent objected that the evidence of the petitioners that they were entitled to vote and had voted at the election was no evidence, and that their status could not be proved by the certified copy of the voters' list, because there was no provision in the North-West Territories Representation Act nor in any other Act making such certified copy evidence, and it was not a public document that could be proved by a certified copy under the Canada Evidence Act.

Section 4 of the Territories Representation Act provides that "Every male person shall be qualified to vote at the

Digitized by Google

election of a member under this Act who, not being an Indian, is a British subject and of the full age of 21 years, and has resided in the North-West Territories for at least 12 months, and in the electoral district for at least 3 months, immediately preceding the issue of the writ of election."

Section 28 provides for the appointment of enumerators, secs. 29 to 32 for the manner in which they are to make up the list of electors, and sec. 33 provides that the enumerator is to deliver the voters' list to the deputy returning officer before 8 o'clock in the morning of the polling day. This list is not final, as it is provided by sec. 44 that "The deputy returning officer shall, while the poll is open, if required by any person whose name is not on the voters' list, administer to such person oath number one in the form P, and such oath having been taken, the deputy returning officer shall at once cause such person's name to be added to the voters' list with the word 'sworn' written thereafter."

The oath referred to is as follows: "You do swear that you are of the male sex and a British subject, that you are not an Indian, and that you are of the full age of 21 years, and that you have resided in the North-West Territories for at least 12 months, and in this electoral district for at least 3 months, immediately preceding the issue of the writ of election."

It is then provided by sec. 45 that every person whose name is on the list may be required to take this oath, and if he refuses his name may be struck off the list; and by sec. 46, "Every voter shall be entitled to vote whose name is on the voters' list and has not been erased therefrom in accordance with the foregoing provisions of this Act or whose name is added to the list as herein provided."

It will thus be seen from the above provisions of the Act that the voters' list as prepared by the enumerator and handed to the deputy returning officer is by no means a binding list, and the fact that a person's name is either on the list or not is no evidence that he is or is not qualified to vote, his right to vote in either case being finally decided by his ability to take the oath above mentioned. If his name is on the list and he cannot take that oath he is not entitled to vote; on the other hand, if his name is not on the list and if he can and does take this oath, he is entitled to vote. In the first case his name is struck off the list and in the other it is added. This seems to be a mere detail which the Act compels the

Digitized by Google

deputy returning officer to comply with, and the real criterion of a person's right to vote is his ability to take the oath of qualification.

Both the petitioners in this case have sworn that they are qualified to vote. In giving their evidence they swore to their qualifications in the very terms of that oath, and further that they had actually voted.

It is true that it was held in the Richelieu case, 21 S. C. R. 168, that the status of the petitioners can only be proved by the production of the voters' list actually used at the election or a copy thereof certified by the Clerk of the Crown in Chancery, but the reasons given for that judgment as set out in the decision of Strong, J., do not in any way apply to the Territories. . . . [See pp. 174 et seq.]

None of this reasoning applies to the Territories Representation Act, the opposite being the case here, so that I think the judgment in that case is no authority as to our Act, and apparently Parliament was of the same opinion, as it has made no provision for certified copies of the list of electors in the Territories being evidence, as is provided in the Franchise Act, although the inconvenience of requiring the Clerk of the Crown in Chancery to attend with the list of electors returned to him is as great if not greater than in the other provinces.

For these reasons I am of the opinion that the evidence given was admissible to prove the status of the petitioners.

But this was not the only evidence given. A copy of the voters' list used at the election, certified to by the Clerk of the Crown in Chancery, was put in under the provisions of the Canada Evidence Act. To this the respondent's advocate objected that it was not a public document that could be proved by a certified copy. I cannot agree with this contention. I think the voters' list is a public document, and, as the original could be received in evidence, the certified copy is also evidence under the Canada Evidence Act. In referring to voters' lists in the Two Mountains Election case, 31 S. C. R. 445, Gwynne, J., said: "The appellant relies upon these two cases, and the respondent does not at all question their authority in the present case, but neither the Richelieu case nor any other case has ever held that original public documents of which for convenience of proof a certified copy by a proper officer in charge of the original

Digitized by Google

may be made by statute prima facie evidence when themselves produced, constitute no evidence. The originals themselves when produced constitute the best evidence."

The Clerk of the Crown in Chancery is the proper officer to certify to this list. The provisions of the Dominion Elections Act as to the sending of the voters' list to him are made applicable to the Territories. So he is the officer in charge of the very list that was used at the election, and he has certified that the copy put in is a true copy of that list, and, as the petitioners have identified their names thereon, I think they have proved their status.

The next objection of importance taken by the respondent was that no notice of the presentation of the petition nor any notice of the nature of the security furnished or of the manner in which and the time when same was furnished, was given to him.

Section 10 of the Controverted Elections Act provides that notice of the presentation of a petition under this Act, and of the security, accompanied with a copy of the petition, shall, within 5 days after the day on which the petition has been presented, be served on the respondent."

Under the original Controverted Elections Act this notice was of first importance. That Act provided, as in the English Act, that the security might be given either by a deposit of $1,000 in money or by a recognizance with not more than 4 sureties who were to justify by affidavit, and the respondent had the right within 5 days to object to these sureties on the grounds set out in that Act. The importance of this notice was pointed out by Grove, J., in Williams v. Mayor of Tenby, 5 C. P. D. 135, 137. . . .

Since the Act has been changed, doing away with the recognizance and providing for the security being given by a deposit of money only, the notice would not seem to be of so much importance, but, as the Act retains the provision for giving the notice, this provision must still be complied with.

The notice which was given in this case was as follows:

"In the Supreme Court of the North-West Territories.

"Dominion Controverted Elections Act.

"Election for the Electoral District of Alberta holden on the 27th day of October, A.D. 1904, and the 3rd day of November, A.D. 1904.

"Notice of presentment of petition and deposit of security.

Digitized by Google

"Take notice that on Tuesday the 13th day of December, A.D. 1904, the petition of Robert John Elmslie Gardiner, of Macleod, in the North-West Territories of Canada, furniture dealer, and of Ethelbert Silvester, of Macleod, in the North-West Territories of Canada, clerk, was duly presented by delivering the same to Dixie Watson, Registrar of the Supreme Court of the North-West Territories, at his office in the Court House in the City of Regina, during office hours, against the election and return of John Herron as a member for the House of Commons for the electoral district of the west riding of Assiniboia, for the reasons therein set forth.

"And further take notice that at the time of such presentation there was presented therewith an affidavit of each of the said petitioners that he has good reason to believe and verily does believe that the several allegations contained in the said petition are true.

"Dated this 13th day of December, A.D. 1904.

"Yours, &c.,

"T. C. Johnstone.

"Advocate and agent for the petitioners.

"To John Herron, Esq.,

"Respondent."

This notice was handed separately to the petitioner immediately before the copy of the petition was given him. It was not annexed to the petition, and, as it referred to a petition against his return as the member for the west riding of Assiniboia, although that is obviously only a clerical error and could not in any way mislead the respondent, I must hold that it does not refer to the petition served, and is therefore not a notice of the presentment of the petition as required by the Act.

If that was all the notice served I would have to allow this objection and dismiss the petition.

At the hearing, the petition itself was put in, and to it was attached, among other things, a copy of a certificate signed by Dixie Watson, Registrar of the Supreme Court, which I think complies with the provisions of the Act as to notice.

The Act requires notice of the presentment of the petition and of the security. Presentment of the petition is to be made by delivering the petition to the clerk of the Court during office hours. This certificate states that this was done. It further states that the security was given. It is not signed by the petitioners' advocate, but the Act does not require that the notice should be signed by any one. By the wording of that Act there is no doubt the notice must be in

Digitized by Google

writing, as it has to be served on the respondent. This certificate was in writing and was served on the respondent attached to the petition. It was as follows:

"In the Supreme Court of the North-West Territories,

"The Dominion Controverted Elections Act.

"Election for a member for the House of Commons of Canada for the Electoral District of Alberta in the North-West Territories holden on the 27th day of October, A.D. 1904, and the 3rd day of November, A.D. 1904.

"Dominion of Canada.

"North-West Territories, to wit:

"I hereby certify that I have this day received from T. C. Johnstone, Esquire, agent for Robert John Elmslie Gardiner and Ethelbert Silvester, petitioners in this matter, the sum of $1,000 as security for the payment of all costs, charges, and expenses that may become payable by the petitioners herein pursuant to the provisions of the Dominion Controverted Elections Act in the matter of the petition of the said Robert John Elmslie Gardiner and Ethelbert Silvester this day delivered to me at my office during office hours against the election and return of John Herron at the said election as a member of the House of Commons of Canada for the said electoral division.

"Dated this 13th day of December, A.D. 1904.

"(L.S.) Sgd. Dixie Watson,

"Clerk and Registrar of the Supreme Court, N.W.T."

The Act says notice shall be given. What then is a notice? In Wharton's Law Lexicon, p. 507, notice is said to be "the making something known to a person of which he was or might be ignorant."

In Greenwood v. Leather Shot Wheel Co., [1900] 1 Ch. p 436, Lindley, M.R., said: "Notice in the section means, not what is called 'constructive notice,' but actual notice, that is, notice which brings home to the mind of a reasonably intelligent and careful reader such knowledge as fairly and in a business sense amounts to notice of a contract."

And in Crook v. Morley, [1891] A. C., at p. 321, the Earl of Selborne, L.C., in a case under the Bankruptcy Act, which provided, "If the debtor gives notice to any of his creditors that he has suspended or is about to suspend payment of his debts," said: "I will only refer to the words of Lord Justice Bowen in the case of Lamb, Morrell Bankruptcy Rep., p. 28, where he asks the question: 'What effect would the circular produce on the mind of a creditor receiving it as to the intention of the debtor with regard to his creditors?'

Digitized by Google

That is the true test. Then I ask what effect would this circular naturally and properly produce upon the minds of the creditors receiving it?"

I think this receipt is a notice under all these tests. It certainly brings home to the mind of the respondent two facts of which notice is required to be given to him by the Act: first, that $1,000 has been deposited with the Registrar of the Supreme Court as security for the costs of a petition against his return as a member for Alberta, and second, that a petition against his return as such member was on the 13th December, 1904, delivered to the Registrar during office hours.

It is true it was not signed by either the petitioners or their advocate. It was held by Osler, J.A., in the Ottawa Election Case, 2 Ont. Elec. Cas. p. 64, that the notice need not be signed. The Ontario Controverted Elections Act provides that "Notice of the presentation of a petition under this Act accompanied by a copy of the petition shall within 5 days, &c., be served." No separate notice of presentation was served, but a copy of the petition itself was duly served, on which was indorsed the following, "This petition is filed;" &c. The only difference between the Ontario Act and the Dominion Act is that in the section which requires notice the words "and of the security" are left out. Otherwise the Acts are similar in this respect. . . .

I think the copy of the certificate of the Registrar served with the petition fills all the requirements of the Act as to notice.

The next objection urged by the respondent was No. 5: "Because the petitioners did not furnish the security for costs prescribed by said Act, nor in the manner prescribed by said Act."

At the hearing the petitioners produced evidence that $1,000 in bank bills was deposited with the clerk of the Court at Regina, that this money was obtained from the Union Bank of Canada here, and the teller of the bank who paid out said money swore it was in bills of the Union Bank. There was also produced and put in evidence the certificate of the Registrar of this Court that the required deposit had been made pursuant to the provisions of the Dominion Controverted Elections Act.

To this evidence it was objected, 1st, that there was no evidence that the money deposited was in bills of a chartered bank; 2nd, if it was proved that the money deposited was in bills of the Union Bank of Canada, there was no

Digitized by Google

evidence that the Union Bank of Canada was a chartered bank; and, 3rd, that the certificate of the Registrar of this Court was only evidence of what it stated, that $1,000 was deposited, and not evidence that that deposit complied with the provisions of the Act.

As to these objections I am satisfied that the money deposited was in bills of the Union Bank of Canada, and that the Union Bank of Canada is a chartered bank doing business in Canada, as the charter of that bank was continued by ch. 26 of 63 & 64 Vict.

I am also of the opinion that the certificate or receipt of the clerk is sufficient evidence, as it states that the deposit was made pursuant to the Dominion Controverted Elections Act, which I take to mean that the deposit complied with that Act, and, as the Act makes that receipt evidence of the sufficiency of the deposit, I find for the petitioners on this objection also.

The 9th objection was that the petitioners did not pay to the clerk or returning officer the cost of publication of the petition pursuant to the provisions of the Act, and the rules and practice relating to the trial of election petitions. It was proved by the petitioners that at the time of the presentment of the petition a copy was left for the returning officer, but no fee was paid in advance for the publication of the notice required to be published. Rule 12 of the English Rules, which apply in the Territories, the Judges of the Supreme Court of the Territories never having made any rules under the Controverted Elections Act, provides that the cost of publication is to be paid by the petitioner.

I do not think this is a good ground of preliminary objection. It does not appear to be of any interest to the respondent that the Registrar gave the petitioners' advocate credit for fees. This was held by Sir M. Tait, A.C.J., in Re Missiquoi Election, 6 Q. P. R. 372.

The 10th objection is to the form of petitioners' affidavit verifying the petition. The Act requires an affidavit of the petitioner "that he has good reason to believe and verily does believe that the several allegations contained in said petition are true." By the affidavit in this case the petitioner swore "That I have good reason to believe and verily believe that the several allegations in the said petition are true."

The respondent's advocate contends that this means that he has good reason to believe and has good reason to verily believe, and therefore does not comply with the Act. I do not see how any such construction can be put on the words

Digitized by Google

used in the petitioner's affidavit, but on the contrary I think it means the same as the words used in the Act, and therefore complies with the Act.

As to the 12th and 13th objections, the respondent objects that there is no evidence that an election was held or that the respondent was returned as elected as set out in the petition. Upon these points I will follow the ruling of Mr. Justice Willes in the Coventry election case, 20 L. T. N. S. 406. In that case Willes, J., said: "I shall not require the election to be proved in any of these cases. I begin by saying that I know as a matter of public notoriety and history that there has been a general election, and that, therefore, there must have been an election for the city of Coventry, and I am bound to take notice of it. There was a return for this borough. If the respondents were not returned at that election I ought to reject them. If they were then I know who were returned."

By the 20th objection the respondent objects to paragraphs 12 to 17 inclusive of the petition, on the ground that even if the allegations therein set out are true they would not justify the trial Judges in disqualifying the respondent or declaring the seat vacant.

These sections of the petition allege certain illegal acts of the enumerators and deputy returning officers. As the respondent's advocate pointed out, such acts to have any effect must have been sufficient to affect the result of the election, and this is not alleged in the petition. I fully agree with this contention, but, following the decision in the Staleybridge election case, 19 L. T. N. S. 660, I will not strike these clauses out. In that case it was sought to strike out a clause which contained an allegation of acts which though illegal would not avoid the seat. Mr. Justice Willes said he fully agreed in the view of the law which had been stated. He thought the offence charged was only the subject of an indictment. The only conceivable case of conveyance of voters voiding a seat was if a man could be supposed to be bribed by a ride to the poll. In the present case he should not order the clause to be struck out. If the petitioner persevered with it, in all probability he would have to pay the costs of it on the trial whatever the issue might be.

The other objections were dropped or included in the ones I have dealt with. The preliminary objections are therefore dismissed.

Digitized by Google

## NORTH-WEST TERRITORIES.

### (WESTERN ASSINIBOIA.)

NEWLANDS, J. JUNE 19TH, 1905

CHAMBERS.

### RE QU'APPELLE DOMINION ELECTION.

*Parliamentary Elections—Controverted Election Petition—Preliminary Objections—Affidavit of Petitioners—Intituling—Receipt—Clerical Error.*

Similar evidence was given on the hearing of the preliminary objections in this case as in the Alberta case (ante), and the two were argued together by the same counsel.

NEWLANDS, J.:—My judgment in the Alberta case applies equally to this one.

Two additional objections were, however, taken in this case.

1. That in the heading of the affidavit of the petitioner Hill the word "Qu'Appelle" was left out in the title; and

2. That the receipt of the Registrar was intituled in the King's Bench instead of the Supreme Court of the North-West Territories.

As to the first objection, the affidavit of the petitioner Campbell was correctly intituled, and as one petitioner is sufficient the objection taken is of no consequence.

As to the second objection, it is, I think, only a clerical error, which cannot affect the petition. The receipt is signed by the Registrar as "Clerk and Registrar of the Supreme Court of the North-West Territories," and is under the seal of that Court.

I therefore dismiss these objections also.

Digitized by Google

## NORTH-WEST TERRITORIES.

### (EASTERN ASSINIBOIA.)

WETMORE, J. JUNE 30TH, 1905.

TRIAL.

## OSMENT v. BLOUNT.

*Specific Performance—Contract to Convey Land—Consideration—Satisfaction of Indebtedness to Plaintiff's Husband—Statute of Frauds—Correspondence—Offer to Convey—Failure to Comply with Terms—Agreement made with Husband—Laches—Concealment of Facts.*

Action for a declaration that defendant held a certain quarter section of land in trust for plaintiff, and to compel defendant to execute a transfer in plaintiff's favour. In 1891 plaintiff's husband carried on the business of a general merchant at Indian Head, and defendant was indebted to him for the amount of a store account. Defendant was about to leave the country, and, as plaintiff alleged, agreed to execute in plaintiff's favour a transfer of the land in question in satisfaction of the store account, and pursuant to such agreement delivered a certificate of title to the land and a transfer. No attempt was made to register the transfer until about the year 1898, when it was discovered that the transfer had never been signed. Plaintiff then, through her agent, one Welsh, corresponded with defendant, and she alleged that the correspondence constituted another agreement of which she was entitled to specific performance.

James Balfour, Regina, for plaintiff.

H. G. W. Wilson, Indian Head, for defendant.

WETMORE, J.:—I am of opinion that plaintiff is not entitled to succeed in this action. It is quite clear to my mind that up to the time of defendant writing the letter of 4th March, 1898, there was no agreement between plaintiff and defendant, or between her husband and defendant, which would support an action for specific performance. There was no payment of the sum of $50 as the consideration for the transfer of this land, as alleged in the statement of claim. The consideration for the purpose of the transfer was an executed one, namely, an indebtedness from defendant to plaintiff, or her husband, or both of them. Neither plaintiff nor any one on her behalf ever entered into possession of the land, or improved it, or did anything with regard to it, except pay some taxes, none of which were paid until 1900.



Digitized by Google

And as there was no agreement in writing to satisfy the Statute of Frauds, and no part performance, there was nothing to support the action in respect to the transactions of 1891.

Now, the next question that arises is whether the letters of Welsh of 6th January and 16th February, 1898, and Blount's reply thereto of 4th March, 1898, constituted an agreement to satisfy the Statute of Frauds, and, if it did, whether plaintiff is entitled under the evidence to specific performance of the agreement by defendant. It is only necessary for me to say that defendant in his letter of 4th March expressed his willingness to sign a transfer, provided some remuneration was given him for doing so, and he requested that the sum of $5 be sent him. That sum was sent by letter of 23rd August, more than 5 months after the date of defendant's letter. Whether that $5 was sent promptly or not is not material, because defendant never got it. Plaintiff therefore has failed in carrying out on her part one of the conditions upon which defendant agreed to transfer the land to her. The letter enclosing this $5 was returned through the mail, and the reason that defendant did not get it was that he had moved his residence in the meanwhile. The fact that he did not get it is no matter of surprise to me, seeing that his request for the $5 to be sent to him was not complied with until 5 months, and more, after he made it. This omission to accede to defendant's request is sufficient to bar plaintiff's right to specific performance.

There are, apart from this, however, a number of objections which would occur to me as sufficient to bar plaintiff's right to recover. One is, that I have very great doubts whether plaintiff was a party to the agreement to receive the deed in satisfaction of the debt. Osment carried on business as a merchant, and the indebtedness was contracted in that business. It is alleged that Mrs. Osment was a partner in that business. The evidence does not satisfy me of that fact at all. I am rather inclined to the opinion that she was not a partner. Her own evidence upon the subject is of a most extraordinary character, and I am inclined to think that such money of hers as was in this business carried on by her husband was money which she allowed her husband to use for that purpose, and that the arrangement between Blount and Osment was one between them; that the agreement, if any, was between Osment and Blount, not between Mrs. Osment and Blount. If so, it would seem to me that she would have no locus standi to bring this action, being no party to the agreement.

Another ground which is fatal, as it occurs to me, to her rights, is the delay which plaintiff has been guilty of before instituting these proceedings. Nothing whatever was done

Digitized by Google

under the arrangement of 1891 for several years, the papers were thrown on a shelf and forgotten, and even when discovered no steps seem to have been taken towards the relief now sought for, and, then, since the letter of 4th March was received from Blount, nothing was done as far as I can see until this action was commenced on 6th June, 1904—more than 6 years afterward. It is a well established doctrine that the Court will not grant a specific performance unless the party asking relief comes promptly, or, to use the words of Lord Alvanley, M.R., in Milward v. Earl of Thanet, 5 Ves. 720 n., "A party cannot call upon a court of equity for a specific performance unless he has shewn himself ready, desirous, prompt, and eager;" and this is stated to be a well established principle by Cotton, L.J., in Mills v. Haywood, 6 Ch. D. at p. 202.

There is another objection that occurs to me which affects the agreement alleged to be contained in this letter of 4th March, that is, that it was attained by concealment or suppression of facts. Both of Welsh's letters that I have referred to were not frank. They concealed the fact that the transfer had not been signed, and put the reason for asking the defendant to sign a transfer upon other and very flimsy grounds, which were substantially not true. However, I feel that I ought not to give effect to the defences of delay or concealment of facts, because neither one of them has been pleaded, and I express no decided opinion with respect to them; I merely mention it in passing. I put my judgment upon the ground that plaintiff has not carried out her part of what defendant insisted upon as a condition of his executing the transfer.

There will be judgment for defendant dismissing this action with costs.

---

## YUKON TERRITORY.

CRAIG, J. JUNE 5TH, 1905.

CHAMBERS.

### RITCHIE v. CANADIAN BANK OF COMMERCE.

*Parties—Adding New Plaintiff without his Consent—Adding Cause of Action Originally Stated—New Cause of Action—Bona Fide Mistake—Account—Bank—Excessive Interest—Interest Voluntarily Paid—Action by Receiver and Judgment Creditors—Addition of Judgment Debtor—Rules 26, 34.*

Motion by plaintiffs for an order adding Thomas G. Wilson as a party plaintiff and for amendment to the writ of

Digitized by Google

summons and statement of claim. The motion was to add Wilson without his consent and against his protest.

Arthur Davey, for plaintiffs.

Frank C. Stacpoole, for defendants and Wilson.

CRAIG, J.:—The Hudson Bay Company obtained a judgment against Wilson, and in that action Ritchie was appointed receiver. Afterwards, by order of Mr. Justice Macaulay, Ritchie was authorized to sue and bring action, and under that order he brought this action against the Bank of Commerce, setting out that the Hudson Bay Company were creditors of Wilson, the judgment, the return of a writ of fi. fa. nulla bona, Wilson's insolvency, Wilson's execution of several mortgages and assignments of books debts, etc., to the bank, Wilson's carrying on of a large business, having bank deposits and discounting notes with the bank, on which discounts and advances the bank charged interest at the rate of 24 and 12 per cent. per annum, in excess of the rate permitted by the Banking Act; and asked for an account of all dealings between Wilson and the bank, investigation into all the assignments and the book debts, alleging that these were assigned with intent to defeat, delay, and prejudice the company and to give an unjust preference, and that they were transferred and assigned fraudulently for the purpose of defeating the company and other creditors; asking for an account of these matters and of the interest overpaid and payment of the amount to the receiver; a declaration that the mortgages were void; an injunction restraining, etc. The defendants thereupon moved that the plaintiff's claim be struck out. on the ground that the receiver had no right to bring an action in his own name. Upon that motion I gave judgment, . . . that the receiver had no right in his own name to sue as he did, but I gave leave to Ritchie to amend by adding either the Hudson Bay Company as a party plaintiff or Wilson or both, reserving all questions as to whether they were properly joined, and also the question whether security for costs should be given, depending entirely upon the frame of the action and who was joined, holding that Wilson should not be joined with the receiver to set aside his own assignments and mortgages to the bank, but if the Hudson Bay Company were joined alone then they would have to give security for costs. Thereupon Ritchie added the Hudson Bay Company and Wilson without Wilson's consent. Wilson promptly moved to have his name struck out as a plaintiff, alleging that he not only declined to be added, but positively refused to be added as plaintiff. Mr. Justice Dugas heard the motion and made an order striking out the name of Wilson, but adding to his order that it was made without

Digitized by Google

prejudice to any application by the plaintiffs to add Wilson as a party to the action.

The plaintiffs now seek to amend their statement of claim by eliminating from it all the allegations of fraudulent preference, simply asking for an accounting and in that accounting an accounting of the excess of interest paid by Wilson over and above the bank rate.

The Rule under which the application is made is our Rule 26, read with Rule 34. Rule 26 provides that "where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Judge may, if satisfied that it has been so commenced through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as are just." And Rule 34 provides that "no cause or matter shall be defeated by reason of misjoinder or nonjoinder, and the Judge may in every cause or matter deal with the matter in controversy, so far as regards the rights and interests of the parties actually before him, at any stage, upon or without the application of either party, and, upon such terms as appear just, order that the name of any parties improperly joined or who should be joined, be struck out or added or substituted." It is quite clear from this Rule that a bona fide mistake must be shewn, and at the same time that it is necessary for the determination of the real matter that the person be added or substituted. Both these things must concur.

First, in this matter was there a bona fide mistake? I think from the authorities that the mistake may be either one of fact or law.—see Ayscough v. Buller, 41 Ch. D. 341; also Duckett v. Gover, 6 Ch. D. 84, particularly the judgment of Jessel, M.R., at p. 85, where he says: "Now that unquestionably extends to a mistake in substance, and in 9 cases out of 10 if there is a mistake in substance, it will be found that there is a mistake in law. Why should it not include a mistake in law? In my opinion it does."

I think there is no doubt that the receiver can add parties plaintiff to aid him in the recovery of the estate or property belonging to the estate, and in this country without the consent of the party to be added. I do not think that under our Rule consent is required; but it must be to aid him in a proper action. The order appointing the receiver and the order permitting him to bring the action cannot vest in him an action or right of action which he has not got by virtue of his receivership.

I first have to determine whether there was a bona fide mistake. The receiver certainly was in error in suing in

Digitized by Google

his own name alone, and so far as that is concerned he would be entitled to add the execution creditors as parties to entitle him to ask for an account which the defendants have refused to give. But when he goes further and asks to institute a different kind of action,—an action attacking a payment of interest by the judgment debtor before judgment or recovery against the debtor, I think he does not come within the authorities. There could be no mistake, it seems to me, in law. The facts were all before the receiver and the Hudson Bay Company. It is a question—has a judgment creditor (a third party) any such connection or privity as would enable him to force an unwilling debtor to bring an action for the recovery back of a sum of money which he voluntarily paid. I cannot conceive that to be either a mistake of fact or law, and for the purpose of attacking an account of the dealings between the debtor and the bank I do not think that that is a necessary issue. It may be argued that the creditor will obtain the benefit of any disallowance of such payments and would thereby enhance the estate of the debtor; that the interest is as much a part of the account as any other item of payment or charge. This, I conceive, would be quite true as regards the interest actually charged by the bank of its own motion, but not as regards interest which has been paid by the debtor, actually and voluntarily paid over by him. It seems to me that the creditors would have no more right to compel the debtor to bring such an action than they would have to compel him to bring an action, we will say, for money which he had paid over to a hotelkeeper for liquor sold over the bar. Such an action for liquor so sold could not be maintained. But if the debtor voluntarily paid his hotel liquor account, could the creditors compel him to sue the hotelkeeper to recover back these payments, and thereby add to his estate in that way, or could they compel him to bring any other action which would add to his estate,—an action for libel or for assault or damages of any other nature? It may be said that these payments of interest arise directly out of the dealings of the debtor and the bank with his estate and out of his banking transactions. That, I think, would be true, as I said before, of interest charges by the bank, but not of voluntary payments.

Several cases have been cited of the addition of parties, which I mentioned in a former judgment of mine—Hogan v. Baetz, ante 393. I may shortly refer to those cases again: Tinning v. Bingham, 16 P. R. 110; Blackley v. Dooley, 18 O. R. 381; Turquand v. Fearon, 4 Q. B. D. 280; Walcott v. Lyons, 29 Ch. D. 584; and Hughes v. Pump House Hotel Co., [1902] 2 K. B. 485. As I pointed out in that former judgment, I think this principle runs through the cases, that

Digitized by Google

where there is a clear and distinct cause of action, and there is doubt as to the right of recovery in one or other of the parties, the Court will aid in the recovery on that cause of action and will not allow it to be defeated by reason of a nonjoinder, even if the original plaintiff had no cause of action in himself legally. But where a party plaintiff seeks to incorporate another cause of action distinct from anything connected with himself or his own rights, then the Court will hesitate to add the party, particularly to add him against his consent and wishes. In Cloves v. Hilliard, 4 Ch. D. 413, it was held that "where the original plaintiff has no cause of action he cannot by amendment introduce a plaintiff in whom there is a right of action and so make an entirely new case." It may be urged that this claim was part of the original action so set out in the pleadings, but I do not think that by pleading a person can invest himself with a right of action which he apparently admits he has not in himself, not one as to which he has doubts whether he has or has not a right of action in fact or in law, but one which requires the aid of another person to create and enforce. It is not by way of help that the Hudson Bay Company requires the addition of Wilson to aid them in the recovery of an account of which there is doubt, but it is to create a cause of action which they have not got themselves and which will add to the assets of the debtor.

This Court has held in Benallack v. Bank of British North America that a third person—a creditor—has no right to raise that issue and has no right to recover upon that issue, raising the question of excessive interest charged by the bank. This case of Benallack v. Bank of British North America went to the Supreme Court, and while they did not touch upon the interest question, it seems to me by their silence they really concurred with this Court in the view which they expressed, because, if it had been otherwise, if they had thought this Court was wrong in the view which they held upon that point, they would have said so and allowed the account of the excess of interest for the benefit of the creditors.

It is objected that since this action was instituted the defendants have recovered a judgment against Wilson for a large amount of money, and that that judgment against Wilson is an estoppel to this action and to an account as between the bank and Wilson. That was a judgment recovered by default of appearance, and I do not think it is any estoppel to plaintiffs in seeking the ordinary account, nor do I think plaintiffs are obliged to offer to redeem the mortgages before taking this account. By the way I notice by the material that in the recovery of this judgment by the bank

Digitized by Google

against Wilson they have credited him with a large amount, $35,378.62, being the excess of interest charged. This would seem to eliminate the question of excessive interest from the account, and it seems to me that it would be an estoppel to the bank in charging such interest in the present accounting.

I would be disposed to aid the plaintiffs if I could see my way to do it at all, owing to the very extraordinary statement made by the plaintiffs' counsel, and not denied by Wilson's counsel, that the goods which were the subject of the suit between the Hudson Bay Company and Wilson—a very large amount, something over $30,000 worth—on their arrival in Dawson were at once by Wilson transferred over to the bank and the entire proceeds were appropriated in that way by him, thus entirely preventing plaintiffs from recovering any part of the value of their own goods by the sale of them. He deserves no sympathy whatever from the Court in the matter. My opinion is that Wilson may be added so far as is required to aid in the ordinary accounting, but not upon the question of interest voluntarily paid. Upon the question of interest charged by the bank without Wilson's consent and which thereby affects the accounting, he may be a party, but he cannot be a party to any issue raising the question of the return of interest voluntarily paid by him. If the pleadings are amended to meet these views, then Wilson will be added as a party upon terms that the plaintiffs indemnify him for his costs.

The costs of this motion will be costs in the cause to defendants and Wilson in any event of the cause.

---

## YUKON TERRITORY.

CRAIG, J. JUNE 9TH, 1905.

CHAMBERS.

### ALASKA MERCANTILE CO. v. BALLANTINE.

*Appeal—Notice of Appeal—Extending Time for—Discretion —Solicitor's Slip—Terms—Costs—Security.*

Motion by defendants for an order extending the time for appeal.

Frank R. Stacpoole, for defendants.

J. B. Pattullo, for plaintiffs.

Digitized by Google

CRAIG, J.:—Plaintiffs moved for final judgment after appearance, and upon that motion succeeded in obtaining an order upon which they issued execution, but upon which they have not realized, it appearing that defendants are insolvent.

The defendants' solicitor spoke of an appeal, but by mistake, instead of filing notice of appeal within 15 days as required, waited for 25 days, believing that he had 30 days within which to serve the notice.

Between the time of obtaining judgment and the time of the application to extend the time, an interpleader issue was tried, occasioning considerable costs which plaintiffs had to pay because they failed upon the interpleader issue.

I have read the cases cited to me, namely, Ross v. Robertson, 7 O. L. R. 464, 3 O. W. R. 513; Re Gabourie, 12 P. R. 252; Winnett v. Renwick, 6 P. R. 233; Re New Callao, 22 Ch. D. 484; Wilby v. Standard Fire Insurance Co., 10 P. R. 34; and other cases. I am most impressed with the reasoning in the case of Ross v. Robertson, in the judgment of Mr. Justice Osler, who says: "It is useless to explore the museum of legal antiquities for weapons with which to combat a motion of this kind. They abound but are rusty and no longer serviceable." Naturally this would be so in any motion where the discretion of the Judge has to be exercised, the shades of distinction and differences in the various cases being so great that a discretion exercised at one time would not be a discretion applicable to a different kind of case or circumstances.

In the case before me there has been no delay prejudicing the right of plaintiffs, no sitting of the Court of Appeal has intervened and been lost. Defendants are not asking for a stay. I cannot say that the appeal is entirely groundless. Defendants do raise what might be called a plausible argument, and perhaps their defence is arguable, and if so they probably should not have been deprived of the right to defend. However, I will not pass upon the merits of the case at all, but purely upon the merits of this application for leave.

The order will go that they have leave to appeal, but upon terms that they pay the costs of this motion forthwith after taxation and as a condition of the leave, and also that they give security for the costs of the appeal, and if any stay is to be had they must also give security for the debt.

Digitized by Google

## YUKON TERRITORY.

CRAIG, J. JUNE 12TH, 1905.

CHAMBERS.

### CANADIAN BANK OF COMMERCE v. McDONALD.

*Discovery—Production of Documents—Mortgage—Estoppel —Fraud—Discovery Limited as to Date by Affidavit on Production — Account — Preliminary Issue — Better Affidavit.*

Motion by defendant McDonald for a further and better affidavit on production by plaintiffs.

August Noel, for defendants.

O. H. Clark, K.C., for plaintiffs.

CRAIG, J.:—Plaintiffs (the bank and Donald A. Cameron) sue upon a mortgage made to secure $174,192.54, and in their pleadings they recite that the mortgage is made up of a promissory note, an overdraft, guarantees of Doherty, Stiles, & Doherty, and guarantee of the McDonald Trading Company, and claim a balance, after setting out the various accounts and their credits, of $67,212. These securities, the mortgage and the covenant, were dated 25th August, 1903. Defendants set up a variety of defences, denying the making of the documents in question, denying the guarantees and the overdraft, but mainly raising the question of excessive interest charged by plaintiff bank during a long series of accounts and dealings running back for 7 or 8 years; and also that the mortgage and covenant for security provide for a rate of interest in excess of the rate provided for by the Bank Act, asserting the illegality of taking such interest; and further defendants plead fraud and misrepresentation by which they were induced to execute a mortgage; they also allege duress on the part of plaintiffs; they also allege collateral credit account derived in various ways, particularly in regard to moneys which were deposited in the bank over which there was a contest between McDonald and one Butler, and an agreement by which the bank were to allow interest from the time of the deposit of the total sum on the share coming to McDonald after the final adjustment of the accounts between McDonald and Butler at the end of the law suit. And de-

Digitized by Google

fendants also allege improper accounting in regard to the Doherty, Stiles, & Doherty guarantee. Then by way of counterclaim they repeat all the allegations in the statement of claim and claim delivery up of the mortgage, an account and payment, or an allowance of all interest charged in excess of the rate provided for by the Bank Act. The plaintiff bank on the affidavit of production produce only such documents as they have after 1903, that is, so far as the documents affect the dealings directly covered by the mortgage security, and set up the doctrine of estoppel, that the mortgage is an estoppel, and that the defendants have no right to go behind it to investigate the transactions prior to that date.

First, as to the estoppel. Phipson on Evidence, 3rd ed., p. 607, says: "There can be no estoppel when the deed is tainted by fraud or illegality. A party to a deed is not precluded from impeaching it on the ground of fraud, duress, infancy, or the like, or where both parties know or have the means of knowing that it was executed for an immoral purpose or in contravention of any statute or of public policy, neither party will be estopped from proving these facts." I quote this mainly on the ground of public policy, the allegation being that the transaction which defendants seek to attack is void as being against public policy and a statute, namely, the Bank Act. I also cite Best on Evidence, p. 523. I, therefore, do not think that in this case, where fraud is alleged as well as duress and public policy, the mortgage is an estoppel, that is, to prevent defendants seeking discovery of facts which will aid them in proving that issue. The question is altogether one of relevancy. What do the issues joined involve and what are the facts about which the parties are contending? Certainly the issues joined here involve these questions, and these questions arose before August, 1903. See the judgment of Esher, M.R., in Marriott v. Chamberlain, 17 Q. B. D. 154; also Compagnie Francaise v. Peruvian Guano Co., 11 Q. B. D. 39. These are very strong cases upon the right of the party seeking discovery to obtain information, "directly or indirectly, enabling him either to advance his own case or damage the case of his adversary." The case of Jones v. Monte Video Gas Co., 5 Q. B. D. 556, is the leading authority upon the question of tests on the rule to be applied in ordering further affidavit on production. In that case Brett, L.J., says: "We have consulted

Digitized by Google

all the other members of the Court of Appeal who usually sit and act, and we are of opinion that the rule to be observed is as follows—every party to an action has a right to take out a summons that the opposite party shall make an affidavit of documents. When the affidavit has been sworn, if, from the affidavit itself or from the documents therein referred to, or from an admission in the pleadings of the party from whom discovery is sought, the Master or Judge is of opinion that the affidavit is insufficient, he ought to make an order for a further affidavit." Now the affidavit itself limits the discovery to a certain date. The pleadings of the plaintiffs set out how the mortgage is made up of previous notes, overdrafts, and guarantees. I think one can infer from the pleadings that there must be other documents in the possession of the plaintiffs upon these points. If the parties making discovery swear that they have no further documents that are relevant and have not had any, then I do not think we can go behind the affidavit unless the parties make some admissions which would bind them. But it is quite evident here that they have relied upon the doctrine of estoppel, and while I do not propose to determine that question now, still I do not think that is an answer to a demand for discovery when the parties seeking to set aside the documents plead fraud, public policy, and duress. I might also cite Attorney-General v. Newcastle, 2 Q. B. D. 197, 385, and Lisle v. Kennedy, 27 Ch. D. 20. A strong argument was made by Mr. Clark that the question of liability and of estoppel should first be tried before any discovery was sought or allowed behind the mortgage, and in support of this he cited Graham v. Temperance and General Life Assurance Co., 16 P. R. 536, where it is laid down that "whenever discovery is sought in aid of an issue which must be determined at the hearing, a plaintiff is entitled to it to help him prove the issue, but where it is sought in aid of something which does not form part of what he must prove at the hearing but is merely consequential to it, the right is not absolute but discretional until the plaintiff has established his fundamental right at the hearing." I think that is a correct rule to follow. There is also the case of Schreiber v. Heymann, 63 L. J. Q. B. 749, where it was held that "where it is possible to deal separately with the questions of liability of the defendant and of the amount of damages, the Court will not

Digitized by Google

order the production of documents which will assist the plaintiff in establishing the amount of damages only, and which do not bear upon the question of the defendant's liability, until the question of liability has been determined." It is very hard for me in this case to say how far the evidence by way of production which the defendants seek will aid them in establishing the issue which they raise. I feel very strongly that the question of excessive interest and the various accounts which exist between the parties should not be gone into until the question is settled as a question of law whether that interest is recoverable back or not. This Court has already held that it is not. The question went up to the Supreme Court, but was not touched upon except as one might infer from the silence of the Court that they approved of the finding of this Court. In that case, however, it was a third party who was claiming as a creditor of the debtor who had paid the interest to the bank; not, as in the present case, the actual debtor himself bringing the action for re-recovery. The difficulty is to separate what is matter of account from what is matter of evidence to establish the issue.

I think the plaintiffs will have to take that responsibility upon themselves, and to select what documents go to aid the defendants and which they should have to aid them in establishing the bald facts that they allege, if there are any such. But I do not think that the plaintiffs should be called upon now, at this stage of the case, to go into the entire account except in so far as the account affects directly as a matter of proof, charges set out in the defendants' pleadings.

There will be a further affidavit on production, and costs will be costs in the cause.

The plaintiffs will not be required to go back further than 6 years, that is, to the last statement of balance prior to 6 years before the issue of the writ, and they will have 20 days from the service of this order upon them to make a further affidavit.

Digitized by Google

## YUKON TERRITORY.

CRAIG, J. JUNE 14TH, 1905.

TRIAL.

### GRAHAM v. FRANK.

*Partnership — Profits — Dispute as to Shares — Finding of Equality — Evidence — Depositions in Former Action — —Admissibility—Lack of Opportunity for Cross-examination.*

Action to recover $131.85, the amount of a debt made up of various items. At the trial plaintiff asked leave to amend the last item of account, changing the item from "Balance due on Churchill account" to "Balance due on Howrie account, guaranteed by the defendant." The defendant had notice of plaintiff's intention to apply for amendment 12 days before the trial. The defendant denied the debt and set up a counterclaim to the effect that plaintiff and defendant agreed to work a certain mining claim on Little Dominion Creek in partnership, plaintiff to receive three-quarters of the profits and to pay three-quarters of the expenses of working, and defendant the other quarter.

Kenneth Macrae, for plaintiff.

J. G. Hay, for defendant.

CRAIG, J.:—The evidence of plaintiff and of defendant is directly contradictory as to what the agreement was relative to the partnership, but the evidence of the circumstances connected with the working of the claim throws discredit upon the story of defendant. It appears that plaintiff did not himself work upon the claim, but employed two men to represent him. Defendant did work and another man with him. Plaintiff paid the wages of the two men employed by him and boarded them. Defendant boarded the man whom he employed, Chretien, who lived in the same cabin with him, and they bought their supplies in common. Defendant kept a book in which he charged up his own wages and the wages of this man Chretien whom he hired. Plaintiff also kept a book in which he charged up the wages of the two men he hired. This goes directly to confirm the story of plain-

Digitized by Google

tiff, and, if the evidence were evenly balanced, I must find in a partnership of that nature, where there is no evidence of the real partnership, or there is contradictory evidence of equal weight on both sides, that the partnership is an equal one, equal risks and equal gains. So that I find against defendant in his view on the counterclaim. I also find for plaintiff on the account sued, and I do not accede to the argument of counsel for plaintiff that there should be any allowance for costs in regard to the amendment. Ample notice of the amendment was had long before the trial, and there was no surprise in the matter.

Incidentally a question was raised which is of some importance. Under our Rule 263 it is provided that "an order to read evidence taken in another cause or matter shall not be necessary; that such evidence may, saving all just exceptions, be read by leave of the Court or Judge." The evidence offered under this Rule was evidence taken in another action in which Chretien—the man hired by Frank, the defendant—sued both Frank and plaintiff for his wages. In that action the evidence of two other witnesses was taken,—the men employed by Graham. Graham defended the action. Frank allowed judgment to go by default and did not appear either in Court or at the hearing. While I think the evidence would have been admissible had he defended and been present with full opportunity to cross-examine, I do not think, in the circumstances, that it is admissible. The rule as to that is well laid down in Phipson on Evidence, 3rd ed., p. 396 et seq., where one of the tests as to whether depositions taken at a former trial shall be read, is opportunity of cross-examination. In this case there was neither the right to cross-examine nor the opportunity, because, having allowed the judgment to go by default, Frank had no right to appear in the action and cross-examine the witnesses. He certainly had not the opportunity, not being present and there being no necessity for his presence. I ruled upon that application that the evidence should not be read.

Upon the whole case I direct judgment for plaintiff for the claim sued for, $131.85, and against defendant on his counterclaim, and declare that there was an equal partnership, and that an account be taken of the partnership transactions upon that basis; the costs of the action to be to plaintiff and the costs of the counterclaim to be based upon the finding of the Master. If there shall be shewn to be no money in

Digitized by Google

the hands of Graham for which he should account to Frank upon the result, then Frank will pay the costs. On the other hand, if there is money on hand then the costs will come out of the fund.

---

## YUKON TERRITORY.

CRAIG, J. JUNE 15TH, 1905.

**CHAMBERS.**

### THOMAS v. CLARK.

*Security for Costs—Non-compliance with Order—Neglect to Indorse Order with Notice under Rule 329—Notice not Applicable.*

Motion by defendant to dismiss the action for non-compliance by plaintiff with an order for security for costs.

Frank J. McDougal, for defendant.

F. G. Crisp, for plaintiff.

CRAIG, J.:—Mr. Crisp, for the plaintiff, cites Rule 329, which is as follows: "Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered, shall state the time, or the time after service of the judgment or order, within which the act is to be done. Upon a copy of the judgment or order which shall be served upon the person required to obey the same, there shall be indorsed a memorandum in the words or to the effect, namely: 'If you the within-named A. B. neglect to obey this judgment or order by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the said judgment or order.'"

The order for security for costs was not so indorsed, and it is contended that the motion to dismiss the action must fail for that reason. There was cited to me the case of Leadley v. Gaetz, 40 C. L. J. 680, where it was held that this Rule applied to orders for discovery of documents. I do not think the Rule applies to orders for security for costs. There could not be execution for non-compliance. It is an order taken out for the security of the defendant,—indemnity

Digitized by Google

against his costs to which he is entitled as a matter of course. The only penalty to which the plaintiff would be liable would be dismissal of his action. The time within which the security is to be given is embodied in the order. There is no order requiring the party served to do any act or thing in pursuance of the order. It is an order which the defendant takes out for his own security and cannot be enforced by execution, as I have already said, and I do not think the Rule applies to any such order, and it is distinguished from the case cited. Owing to the circumstances stated by the plaintiff he will have another month to perfect his sceurity.

The costs of this motion will be costs to defendant in any event.

---

## YUKON TERRITORY.

CRAIG, J. JUNE 27TH, 1905.

CHAMBERS.

### HOGAN v. BAATZ.

### HOGAN v. BAATZ AND TAYLOR.

*Set-off—Costs—Damages—Different Actions in Same Court —Discretion—Solicitor's Lien.*

Motion by plaintiffs (Hogan and Winscott) for a set-off of costs.

Arthur Davey, for plaintiffs.

George Black, for defendants.

CRAIG, J.:—Plaintiffs sued defendant Baatz on a promissory note, and at the same time defendants Baatz and Taylor to set aside a transfer of property, alleging that it was made in fraud of plaintiffs. These actions were running concurrently, the same solicitor being employed for Baatz in both actions, a different solicitor for Taylor. Plaintiffs abandoned the second action with costs against them, but no taxation of costs was had before the trial of the previous action on the note. In the action on the note plaintiffs recovered judgment, and by the evidence in that action it appeared that Baatz had transferred all his property to his co-defendant in the other action, Taylor, and was, so far as could be seen, without means available to pay the judgment on the promissory note. It also appeared from this evidence that Baatz was very largely indebted to plaintiff Winscott for sums apart from the



Digitized by Google

promissory note, these men having been engaged together in mining ventures, Winscott having grubstaked Baatz and allowed him to deal very freely with his money and means, and Baatz having given him little or nothing out of the ventures, which, it appears clearly from the evidence, turned out to be profitable. Altogether Baatz had used Winscott, as it appeared from the evidence given in that trial, very badly. Upon judgment being pronounced in favour of the plaintiffs in the first action, counsel at once applied to have the costs of the abandoned action set off against the costs and judgment in the other action. After the abandonment of the second action and before taxation of costs, defendant Baatz assigned to his solicitor the costs of that action by an assignment under seal. Plaintiffs do not seek to interfere with the costs of Taylor in the action, which they must pay, but only seek to have a set-off as against the costs of Baatz.

Rule 14 of Order 65 provides: "A set-off of damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought." . . .

[Reference to Hassel v. Stanley, [1896] 1 Ch.; Edwards v. Hope, 14 Q. B. D. 922; Blaikie v. Latham, 41 Ch. D. 678; Goodfellow v. Gray, [1899] 2 Q. B.]

Rule 14 seems to make no distinction between set-off of damages or costs between parties, the only thing being the question of the Court's discretion regarding solicitor's lien, and while I would be tender in disturbing a solicitor's lien, especially if he was not the same solicitor in the two independent actions, yet in this case the solicitor had full notice during the whole of the proceedings of the other action; he was aware of the claim which the plaintiffs set up on the promissory note and of the action which was taken to set aside the conveyance of property, so that the plaintiffs might realize upon the judgment obtained upon the promissory note. At the time when the costs were incurred in the abandoned action, there was the clear right of set-off in plaintiffs upon their note upon which they afterwards recovered. The solicitor has not seen fit to rely upon his lien. He has taken an assignment which, I take it, merges the lien in the higher security, which is under seal. There may be some doubt as to whether an assignment under seal is or is not a higher security, but I think the solicitor has settled that matter by taking the assignment with full knowledge of all the facts. He certainly regarded it as a higher security which he substituted for his security under his lien. In Goodfellow v Gray, Vaughan Williams, L.J., was of opinion that a charging order was of greater force than a lien.

As I take it, I first have a discretion. The solicitor's lien is not an absolute charge as against the right of the parties.

Digitized by Google

For this I cite the cases of Cattell v. Simons, 6 Beav. 304; Robarts v. Buee, 8 Ch. D. 198; and Bawtree v. Watson, 2 Kean 713. If it were simply a matter of discretion, I do not think I would exercise it in this case in favour of the solicitor's lien, but the lien being merged in the security of the assignment which the solicitor took, I think he stands in no better position than the debtor stands under our Ordinance, sec. 4 of ch. 37 of the Consolidated Ordinances, 1902, respecting assignment of choses in action, which subjects the assignee to any defence or set-off which applies between the debtor and the original creditor.

I think, therefore, the order should go in this case that there be a set-off between the parties, of the costs to which the plaintiff is liable to pay in the abandoned action against the costs and damages which he recovers in the other.

---

## YUKON TERRITORY.

MACAULAY, J. JUNE 24TH, 1905.

CHAMBERS.

### LEDIEU v. ROEDIGER.

*Jury Notice — Regularity — Action for Damages — Amount under $500—Statutes—Construction—Application — Repeal.*

Application by plaintiff for an order striking out the jury notice filed by defendants, on the ground, among others, that the amount of damages asked for by plaintiff being not in excess of $500, the case was one which, under the Ordinances in force in the Yukon Territory, must be tried by a Judge without a jury.

MACAULAY, J.:—Section 9 of the Yukon Territory Act, which came into force in this country in 1898, is as follows:—"Subject to the provisions of this Act, the laws relating to civil and criminal matters and the Ordinances as the same exist in the North-West Territories at the time of the passing of this Act, shall be and remain in force in the said Yukon Territory in so far as the same are applicable thereto until amended or repealed by the Parliament of Canada or by any Ordinance of the Governor in council or the Commissioner in council made under the provisions of this Act." Consequently the laws in force in the North-West Territories at

Digitized by Google

the date of the passing of the Yukon Territory Act, became a part of the laws of the Yukon Territory.

Section 88, sub-sec. (2), as it existed at the time of the passing of the Yukon Territory Act, and also sec. 170 of the Judicature Act of the North-West Territories, accordingly became part of our laws, the latter section being numbered as section 169 of the Judicature Act of the Yukon Territory.

I further find that, according to the provisions of Ordinance 22 of 1903, of the Yukon Territory, sec. 18, being "An Ordinance to amend the Judicature Ordinance and Rules," secs. 168, 169, 170, 171, and 172 of the said Judicature Act of the Yukon Territory were repealed and sec. 168 substituted in lieu thereof, which provides as follows: "When any party desires and is entitled to have the question of fact in any action tried by a Judge with a jury, he shall, if a plaintiff, demand a jury in his notice of trial to be given as hereinafter provided, and if a defendant, he shall make such demand by giving notice thereof in writing to the plaintiff's solicitor within 4 days from the time of the service of notice of trial by the plaintiff or within such extended time as the Court or a Judge allows, or in the notice of trial to be given by the defendant, as hereinafter provided, and thereupon the said questions of fact shall be so tried."

If the Yukon council had the power to repeal the said sections, the only provision remaining which would indicate when a party to an action such as the present is entitled to a jury would be sec. 88 of the North-West Territories Act as it existed at the time the said Act became a part of the laws of this Territory.

The legislature of the North-West Territories, by Ordinance 6 of 1893, passed sec. 155 of the Judicature Act of said Territories, which was afterwards consolidated as sec. 170 of the said Judicature Act, and is in the same words as was sec. 169 of the Judicature Act of the Yukon Territory, which was repealed by Ordinance 22 of 1903 of the Yukon Council.

After the passing of sec. 155 by the Legislative Council of the North-West Territories, ch. 32 of 60 & 61 Vict. was enacted by the Federal Parliament, which recited that whereas doubts had arisen as to the power of the Legislative Assembly to pass sec. 155, in view of the provisions of sec. 88 of the North-West Territories Act, and whereas it was expedient to prevent any question being raised on the ground of such doubts as to the validity of that provision, the said provision was, by sec. 1 of ch. 32, ratified and confirmed and

Digitized by Google

declared to have the same force in law as if it had originally been enacted by the Parliament of Canada at the time of the passing of the said Ordinance, but the said Act did not state that sec. 88 of the North-West Territories Act was amended accordingly. However, it is clearly stated by all the authors on statute law that if two statutes on the same subject are mutually repugnant, the later Act, without any repealing clause, operates, in the absence of expressed intentions to the contrary, as a repeal of the earlier one, on the obvious principle that the enactment or provisions inconsistent with those previously existing manifests a clear intent to abolish the old law.

Now, it is quite evident that the provisions of sub-sec. 2 of sec. 88 of the North-West Territories Act, as originally provided, would be inconsistent with the provisions of sec. 155 of Ordinance 6 of 1893, which is the same provision as sec. 170 (ch. 21) of the Consolidated Ordinances of the North-West Territories, and sec. 169 (ch. 17) of the Yukon Ordinances.

It would not be possible to have a law providing that certain actions should not be tried by a jury, and the same law provide that the same actions should be tried with a jury, and I am of the opinion that ch. 32 of 60 & 61 Vict. in effect amended sub-sec. 2 of sec. 88 of the North-West Territories Act, and that the provisions of sec. 88, in so far as they were inconsistent with the provisions of sec. 155 of Ordinance 6 of 1893 of the North-West Territories, were repealed, and that at the time of the passing of the Yukon Territory Act, sec. 88 of the North-West Territories Act, as so amended by ch. 32 of 60 & 61 Vict., became and was part of the law of this Territory, and that consequently, when the Yukon Council by Ordinance 22 of 1903, sec. 18, repealed sec. 168, we are compelled to fall back or rely upon sec. 88 of the said North-West Territories Act as amended as aforesaid, and I am therefore of opinion that the law as it stands to-day in this country, in regard to the right to a jury in a case of this kind, is to be found according to the provisions of said sec. 88 as amended as aforesaid, and that the defendant is entitled to a jury in an action such as the present, just as he would have been entitled had sec. 169 of the Judicature Ordinance of the Yukon Territory never been repealed.

Owing to the view I take upon the matter, it is not necessary, in my opinion, for me to decide whether sec. 18

Digitized by Google

of Ordinance 22 of 1903 was or was not ultra vires of the Yukon Council. However, on examining the statutes of Canada of 1903, 3 Edw. VII. ch. 40, "An Act to amend the North-West Territories Act," I find that, according to the provisions of sec. 3 of that Act, power is given to the Legislative Assembly to repeal certain sections of the North-West Territories Act, among them sec. 88; which would seem to indicate that the Parliament of Canada were of the opinion that the legislature of the North-West Territories did not possess the power to repeal the said provisions without such enabling Act being passed.

On the whole, I am of the opinion that, as the law stands in this Territory to-day, either party to an action such as the one before me, or as provided by said sec. 88, is entitled to a jury, or at least the question admits of so much doubt that I would not be inclined to deprive any party who asks for a jury in such a case of the right to have his case tried by a jury.

I am of the opinion, therefore, that the jury notice should stand, but, the question before me being a new one and admitting of doubt, I think the costs of the motion should be costs in the cause to the successful party.

---

## YUKON TERRITORY.

JUNE 27TH, 1905.

FULL COURT.

## NORTH AMERICAN TRANSPORTATION AND TRADING CO. v. OLSEN.

*Contract—Sale of Goods on Credit—Representation by Purchaser—To whom Credit Given—Contradictory Evidence—Liquor License Ordinance—Licensee — Restaurant Business—Estoppel.*

Appeal by plaintiffs from judgment of DUGAS, J., dismissing action for the price of goods sold and delivered.

O. H. Clark, K.C., for appellants.

J. P. Smith, for defendant.

Digitized by Google

The judgment of the Court (CRAIG and MACAULAY, JJ.), was delivered by

CRAIG, J.:—Plaintiffs sue defendant for goods sold, as the statement of claim shews, for use in the Klondike restaurant. The defendant denies the purchase and denies that he was the owner of the business for which the goods were sold, which were groceries, but says that the business was the business of one E. E. Saxe. From the evidence it appears that defendant was the owner of the Klondike hotel, a licensed hotel; that he had been in the habit of dealing with plaintiffs for certain goods, mainly furniture and bar supplies; that he had always paid his bills; that Saxe was a cook who came to plaintiffs' store with a list of goods, telling the clerk who waited on him that he wanted goods which were to be used in the Klondike hotel restaurant, and that Olsen, the defendant, was to pay for them. No interview was had with Olsen in regard to this purchase, but when Saxe came back with the order to be filled, Hope, the salesman of plaintiffs, says he called up the Klondike hotel by telephone and some one answered, not Olsen; he inquired for Olsen; the person went away and another person came to the telephone, whom Hope says he recognized as Olsen from the peculiarity of his voice; he had a strong Scandinavian accent; he asked him about the bill of goods that Saxe was ordering, and the person that he thought to be Olsen said "all right." What the conversation was, does not clearly appear by the evidence, —whether Olsen said that the goods were being bought for him or whether he was guaranteeing the account for Saxe or not; but Hope evidently took it that the goods were being bought for Olsen on Olsen's credit. Olsen denies ever having gone to the telephone or having any such conversation whatever with Hope. He never heard of the purchase until long after. The account was rendered to him; he repudiated it. He swears that Saxe sub-leased from him the restaurant part of the hotel and carried on the business in his own name and for his own benefit. This is confirmed by another witness, who was hired by Saxe at this time. So that there is a direct contradiction between the parties. Plaintiffs' counsel sets up that Olsen is estopped from denying that he was the owner of the business carried on and cites in support of his contention Yukon Ordinance, ch. 76, 1902, respecting the sale of intoxicating liquors, sec. 23 of which is on the matter

Digitized by Google

of accommodation. Sub-section 3 says: "Every licensed hotel shall be shewn to the satisfaction of the inspector to be well appointed, with sufficient appliances for serving meals daily to travellers." Section 27, sub-sec. 6, says: "The inspector shall report a statement whether the applicant is or is not the true owner of the business proposed to be licensed." And sec. 66 provides that, "Subject to the provisions of this Ordinance as to removals and transfer of license, every license for the sale of liquor shall be held to be a license only to the person named therein, and shall remain valid only so long as such person continues to be the owner of the said business there carried on;" the argument being that a person holding a hotel license in this Territory must, besides other things, have accommodation for supplying meals to travellers; must be the owner of the business carried on himself and no other; must continue to be such owner and an owner not only of rooming accommodation and bar accommodation, but also of accommodation for meals, and that under the provisions of the Act any one who is an hotel keeper is holding out to the world that he is the owner of all these and each of these different lines of work and business, and is thereby estopped from asserting anything to the contrary in a case such as the present. Whether or not the holder of an hotel license under this Act holds out to the world that he is the owner of all the various branches of the business, including the supplying of meals, or not, is a question which I do not think I have any need to determine. Such a question might be relevant if plaintiffs had relied upon the representation created by the business. I doubt very much whether plaintiffs can import into a contract such as this a public Act passed for the purpose of regulating the traffic in liquors. To turn the scale in a matter of evidence it might be taken as such; but plaintiffs did not rely upon the representation, and there certainly was no direct representation. They relied entirely upon the contract and upon the credit; they took the precaution to telephone to the person whom they supposed to be the principal and the debtor; they took it that they were dealing with him upon a contract, and upon that contract they relied and upon nothing else, and I do not think they can now invoke the doctrine of estoppel in this way.

I see no reason to disturb the judgment of the trial Judge, and the appeal will therefore be dismissed with costs.

Digitized by Google

## YUKON TERRITORY.

MACAULAY, J. (ACTING P.M.) JUNE 27TH, 1905.

DAWSON POLICE COURT.

### REX v. PICKERING.

*Statute — Construction — Repeal — City Charter—Revocation—Change in Governing Body — Preamble of Statute —Inconsistency with Enacting Parts.*

Information laid by Edward Ward Smith, license inspector of the city of Dawson, against one John E. Pickering, for keeping and using for hire and profit a one-horse dray or waggon without first having obtained the license therefor by law required, contrary to by-law 17 of the city of Dawson.

THE ACTING MAGISTRATE:—The evidence discloses the fact that on one particular occasion on or about 5th June, 1905, Pickering conveyed for hire certain goods within the city of Dawson and received cash in payment therefor. It further discloses that he was in the habit of driving an express waggon in the city of Dawson before and since the date before mentioned, and that he admitted that he was an expressman or drayman, but refused to take out a license as required by law, stating that he did not believe a license was necessary, and that he proposed making a test case: consequently the above information was laid against him.

On 24th August last an Ordinance of the Yukon Council numbered ch. 16 of 1904 came into force, intituled, "An Ordinance to provide for a Plebiscite respecting the Dawson City Charter." The preamble of this Ordinance was as follows:—"Whereas in the opinion of very many of the ratepayers of the city of Dawson the necessities of the said city impose too great a burden upon the ratepayers, and whereas it is deemed advisable that a vote of the said ratepayers should be taken to determine the advisability of revoking the city charter."

Section 17 of the Ordinance provides as follows:—"17. If the majority of the votes polled are in the affirmative, the Commissioner of the Yukon Territory may publish a proclamation setting forth the result of such plebiscite, and thereupon and thereafter all streets, real and personal property,

Digitized by Google

assets, rights, duties, jurisdiction, powers, and privileges now vested in, imposed upon, possessed, or exercised by the mayor and council of the city of Dawson, or by any and all committees of said council, shall vest in, be imposed upon, possessed, and exercised by the Commissioner of the Yukon Territory, provided that in regard to any of such matters the Commissioner shall not act or exercise any of such functions without the advice and consent of the Yukon Council where the same would be required were the act or function one relating to the Yukon Territory beyond the limits of the city of Dawson." This is the principal enacting clause in the Ordinance.

On 17th September, 1904, the Commissioner of the Yukon Territory issued a proclamation reciting the fact that a vote of the ratepayers had been taken on 13th September, 1904, under the provisions of ch. 16 of the Ordinances of 1904, and a majority of the voters polled their votes in favour of a revocation of the charter. The proclamation sets forth the result of the plebiscite, and declares that all streets, real and personal property, etc., as provided in sec. 17 of ch. 16, shall forthwith vest in, be imposed upon, possessed, and exercised by the Commissioner of the Yukon Territory, etc.

There are no words contained in the proclamation shewing an intention of revoking the city charter, but, following the provisions of sec. 17 of Ordinance 16 of 1904, the proclamation declares that the charter is transferred from the mayor and council of the city of Dawson and vested in the Commissioner of the Yukon Territory. The enacting part, in my opinion, is very clear and admits of no doubt; the intention clearly being to transfer the powers and duties, etc., of the city of Dawson from one governing body, viz., the mayor and council, to another governing body, viz., the Commissioner of the Yukon Territory.

It is clearly settled law that in construing the meaning of statutes, where the enacting part is unambiguous, the preamble cannot be resorted to to control it. Where the enacting part is ambiguous the preamble can be resorted to to explain it. I am of opinion that in this case the enacting part is clear, and although the preamble recites that a vote shall be taken to determine the advisability of revoking the city charter, I cannot resort to the preamble in placing a construction upon the statute, because the enacting part clearly and unambiguously states that the powers shall be transferred, and it is clearly the intention that it was not intended that they should be revoked.

Digitized by Google

Cases were cited by counsel on the argument, both in favour of the view that the charter was still in force and opposed to that view. It seems very difficult to find any cases either in the Canadian or English courts or text books respecting a case such as the one before me, and the authorities cited, in my opinion, do not very closely apply to this case.

It was argued before me that, as the Yukon Council or the Commissioner had not passed legislation adopting the by-laws of the city of Dawson, or inserted a saving clause maintaining them after the change in the governing body had taken place, they were no longer in force. While it has not been possible for me to find any English or Canadian authorities bearing on the point before me, there seem to be many American authorities which do bear closely upon a case of this kind. Dillon on Municipal Corporations, at p. 140, says:—"The powers conferred upon municipal corporations may at any time be altered or repealed by the legislature, either by a general law operating upon the whole state, or, in the absence of constitutional restrictions, by a special Act. A charter may be amended, the name of the place and of the governing body may be changed, and its boundaries altered, while in law the corporation remains the same. The insertion in an amended charter of the same provisions that were contained in the old one is not—unless such upon the whole Act appears to have been the intention of the legislature—a repeal of the latter. The law on the subject is thus stated—where a statute does not in express terms annul a right or power given to a corporation by a former Act, but only confers the same rights and powers under a new name, and with additional powers, such subsequent Act does not annul the rights and powers given under the former Act and its former name, there being no express repeal. The change of a city charter does not affect existing Ordinances in harmony with new provisions."

A quotation at p. 141 of Dillon is given from a judgment of Mr. Justice Strong in which he says:—"There is no doctrine better settled than that a change in the form of government of a community does not ipso facto abrogate pre-existing law, either written or unwritten. This is true in regard to what is strictly municipal law, even when the change is by conquest. The Act of Assembly converting a borough into a city does not, therefore, of itself, and in the absence of express provisions to that effect, either repeal the former Acts of Assembly relative to the borough, or annul existing Ordinances. It was solely a change in the organic law for the future and left unaffected the existing Ordinances,

Digitized by Google

precisely as a change of a state constitution leaves undisturbed all prior rights of assembly."

There are also cases cited in Smith's Modern Law of Municipal Corporations in which Judge Dillon's work on Municipal Corporations is frequently quoted.

It is not possible for me to find whether the charters mentioned in Dillon and Smith sprang into existence by the means by which the Dawson city charter obtained its existence, but certainly the means of creating a municipal charter must have been of a similar nature, and, in the absence of any English or Canadian authorities to the contrary, I am disposed to follow the law as laid down in the American authorities, the more so as the closer scrutiny I make of sec. 17 the more convinced am I that it is broad enough in its terms to carry out the intention of the legislating body who enacted it, which, in my opinion, was clearly not a revocation of the charter, but simply a transfer of the powers under that charter from one governing body to another.

I am therefore of the opinion, for the reasons above stated, that the by-laws of the city of Dawson are still in force, and that the Commissioner of the Yukon Territory has the same power to act upon them as was possessed by the mayor and aldermen of the city of Dawson. That being my view, I must hold that the accused Pickering is guilty of an infraction of the by-law in question, in not having taken out his license as required by law. As this was a test case, and the accused only resisted compliance with the by-law for the purpose of testing its validity, I am disposed to only impose a nominal fine.

I find the accused guilty as charged in the information and impose a fine of $1 and costs.

---

## MANITOBA.

PERDUE, J. JUNE 15TH, 1905.

TRIAL.

### CLEMENT v. FAIRCLOTH CO.

*Contract—Sale of Goods—Time for Delivery—Novation—Discharge of Old Agreement — Statute of Frauds—Breach of Contract—Damages—Return of Goods given in Exchange or Value Thereof.*

Plaintiff alleged that in March, 1901, defendants sold him a threshing outfit to be delivered by 15th July, or (as the

Digitized by Google

agreement read) "so soon thereafter as defendants could do so." Plaintiff did not read or understand English, and alleged that the words quoted were not read over to him and were contrary to the representations made to him by defendants' agent, and he asked that the contract be rectified, or that it might be declared that there was no binding contract; and he claimed damages for the work he had lost through the machine not being furnished in time, as it was not.

A. Haggart, K.C., for plaintiff.

H. M. Howell, K.C., and T. L. Metcalfe, for defendants.

PERDUE, J.:—The written agreement executed by the plaintiff at the time the contract was first made between the parties calls for the shipment of the machine "on or about the 15th day of July, 1901, (or so soon thereafter as they can do so)." The agreement also contains a printed clause providing that if, for any cause not under the control of the vendors, the machinery should be delayed beyond the time agreed for its delivery, no damages should be claimed by the purchaser.

The plaintiff alleges that the machine was to be shipped by 15th July, that this was one of the conditions on which he purchased, and that he was not aware that any phrase had been added which would qualify the effect of that condition.

At the time the agreement was entered into it was made out in duplicate, one copy of which was delivered to the plaintiff and remained in his hands. In the dealings and negotiations that followed, this agreement appears to have been referred to by the plaintiff upon more than one occasion. I must hold that he was or should have been aware of the contents of the document at the time he gave up the machine. If he was dissatisfied with the agreement he should at or before that time have repudiated it and have refused to carry it out.

I find, also, that before the delivery of the new machine was due, the plaintiff commenced negotiations with the defendants for a change in the contract, in order to purchase a wind stacker and a more powerful engine. The correspondence leaves no doubt in my mind as to the fact that the plaintiff verbally arranged with the defendants for the change in the machinery.

The larger engine and wind stacker were ordered by the defendants, from the factory, on 6th August. This appears to have been satisfactory to the plaintiff; he received a letter notifying him of the fact that the new machinery was

Digitized by Google

ordered, and he called on the agents to sign a new order on 17th August, but the documents had not arrived.

The new machinery shipped to fill the order as varied was wrecked in a railway accident, while in transit.

The defendants appear to have made every effort to replace the machinery that had been injured and to supply a machine to the plaintiff as early as possible.

On 29th August he served them with a notice calling for delivery by 2nd September of the machine ordered under the first agreement, and informing them that if it was not delivered by that time the contract would be rescinded. Delivery was not made by the date specified, and the plaintiff purchased another machine from the J. I. Case Co.

I think a new verbal agreement was substituted for the written agreement. This new agreement was entered into after performance was due under the written one, and was accepted in discharge of it. Before breach of the written agreement the plaintiff entered into negotiations with the defendants for a variation of the order. While these negotiations were pending the defendants were justified in not shipping the machinery specified in the written contract. Some time after the 15th July it was verbally agreed that the defendants should supply a more powerful engine than the one first ordered, and in addition a wind stacker and a set of trucks, the price to be some $500 more than that in the first order. This must be regarded as a distinctly new agreement which had the effect of discharging the written one, and this even though the new verbal agreement could not be enforced by reason of the Statute of Frauds. I would refer to Goss v. Lord Nugent, 5 B. & Ad. 65; Morgan v. Bain, L. R. 10 C. P. 15; Ogle v. Lord Vane, L. R. 2 Q. B. 275, L. R. 3 Q. B. 272; Hickman v. Haynes, L. R. 10 C. P. 598.

If the plaintiff had been content with the order as it was given in the first place, he would in all probability have received the machine in time to commence threshing as soon as the crop was ready, or he could have held the defendants liable for damages reasonably arising from a breach of the contract. The subsequent dealings between the parties rescinded the first agreement, and he cannot recover on the substituted verbal ones. I must, therefore, disallow the claim for damages occasioned to the crop, through the delay in getting it threshed.

The defendants took as part payment for the new machine an old machine belonging to the plaintiff. The valuation agreed on for this old machine was $1,000. The

Digitized by Google

defendants made a sale of it on 16th March, 1901, and the purchaser took it over from the plaintiff on 22nd July following. The defendants having failed to carry out the verbal agreement, and the written one having been rescinded between the parties, the plaintiff became entitled to the return of his machine. As the defendants had sold it and in this way made it impossible for them to return it, the plaintiff is entitled to receive its actual value. The defendants took the old machine in part payment for the new one at a valuation of $1,000, but this appears to have been a high valuation and was allowed by the defendants in order to put through a sale. They resold it almost immediately, together with a new grinder and drive belt, for $1,020. No evidence was offered as to the price of the grinder and drive belt. The defendants offered to hand over to the plaintiff the notes for $1,020 received on the sale made of the old machine, and the other articles included with it, he to be at liberty to retain the whole proceeds. This offer the plaintiff refused, and I must therefore come to the best conclusion I can as to the amount the plaintiff should be allowed for the old machine. The plaintiff had paid $900 for it 6 years prior to 1901. He stated that in his opinion it was not worth as much when he bought it as when he sold it. It had been repaired. Mr. Walton, who acted as agent for the defendants in negotiating the sale, in a letter to them written on the day of the sale, put the selling price of the old machine at $900. I take this as a fair value of it in the circumstances, and enter judgment for the plaintiff for $900 and interest since 5th March, 1901, with costs of suit.

---

## BRITISH COLUMBIA.

JUNE 7TH, 1905.

### LEE v. CROW'S NEST PASS COAL CO.

*Appeal—Award—Workmen's Compensation Act.*

Appeal by the employers from the award of an arbitrator appointed by a Judge of the Supreme Court under clause 2

Digitized by Google

of the second schedule to the Workmen's Compensation Act, 1902. The arbitrator heard the case and made an award of $1,500 in favour of the applicant.

The appeal came before IRVING, MARTIN, and MORRISON, JJ.

J. A. Macdonald, K.C., for the applicant, took the preliminary objection that no appeal lay, citing Gibson v. Wormald and Walker Limited, [1904] 2 K. B. 40; Workmen's Compensation Cases, vol. 6, p. 155.

Davis, K.C., for the employers (appellants), contra.

Per CURIAM:—No appeal lies and the appeal is dismissed with costs.

---

Digitized by Google

THE

# Western Law Reporter

VOL. I. TORONTO, AUGUST 1, 1905. No. 10.

## YUKON TERRITORY.

JUNE 27TH, 1905.

FULL COURT.

### PACIFIC COLD STORAGE CO. v. TROUGHTON.

*Contract—Construction—Carriage of Goods—Freight Rates —Dispute as to—Correspondence.*

Appeal by defendant from judgment of DUGAS, J., in favour of plaintiffs in action for the recovery of freight for the carriage of certain hides and tallow for defendant from Dawson to Tacoma,—a balance of $460.14, charging freight at the rate of $35 per ton. Defendant set up that the rate was in excess of the rate to which plaintiffs were entitled, and brought into Court what he alleged to be the right amount.

Frank J. McDougal, for appellant.

T. D. Pattullo, for plaintiffs.

The judgment of the Court (CRAIG and MACAULAY, JJ.), was delivered by

CRAIG, J.:—The evidence shews that plaintiffs were carrying on the business of cold storage in Dawson in meats, and had hides which were or were not shipped out to the outside according as it was profitable or not to do so. Defendant was their local manager, and, a short time before these hides were shipped to the outside, decided to go into the business of buying and shipping hides out. He wrote to plaintiffs



Digitized by Google

in October, 1901, as follows: "You will please advise me promptly on receipt of this the best rate you could make me on the hides, furs, and pelts from Dawson to Seattle on the trip down this coming spring of the Kerr and Thompson. In the event could get a satisfactory rate would have about 30 tons. Would have to be low, however, to make shipments possible." And in a postscript, "Would like to get your ideas in the matter of return rates generally." In October of the same year plaintiffs' manager wrote a letter in answer to defendant's letter, as follows: "In answer to your letter of the 10th, if you purchase on behalf of this company you could exercise your discretion as to freight rates. As we operate the Kerr and Thompson and have no return freights, we can afford to bring them out at half the freight rates charged by other companies. We leave you to fix the rate to be charged your office on all shipments on company's account. Our instructions generally on this subject are, that we always return empty from St. Michael, and the Kerr generally goes empty from Dawson. We will carry any freight on company's account when there is a reasonable profit in it. We leave this to your discretion." It will be seen that this letter is not an answer to the letter of the defendant in regard to rates to be charged to him on hides. It is more an answer to his postscript. Whether it was an oversight or intentional does not matter. But the letters together make no contract as to rates or fix no rate as between plaintiffs and defendant, merely allowing defendant, who was then the company's local manager at Dawson, to use his discretion in regard to shipments on company's account only. Defendant sets up an agreement arranged verbally with the manager of the company when outside, prior to these shipments; but that is denied and not proved. No rate apparently is fixed. Plaintiffs fixed $35 as being a reasonable rate and proving both by themselves and by admissions from defendant that he had on behalf of the company paid as high as $37.50 or $40 per ton for the same class of goods shipped by the White Pass and Yukon route to the same destination. Defendant tried to overcome this evidence by saying that that was a preferable and better route to ship by, being shorter and quicker. It is also in evidence that defendant was at the head office of the company on the outside and interviewed their auditor on this very account, and there he did not set up, as he now does, any agreement at all, but simply said if they

Digitized by Google

insisted on the amount being paid he supposed he would have to pay it. This conversation was overheard by another witness. And also in a letter which defendant writes afterwards he expresses the same views, saying: "If you insist on your being justified in this demand I presume there is nothing left for me to do than to pay it." But nowhere in this letter or in the interview which he had with the company does he set up the agreement. He endeavours to prove that other independent lines of steamers would have taken the freight at a lower rate by way of St. Michael, but these steamers were simply tramp steamers which had no regular trips, whose trips were doubtful, and they cannot be taken as establishing any fixed rate from Dawson to the outside. It is also singular that defendant, when he interviewed the solicitor for plaintiffs after the issue of the writ, suppressed a part of the letter on which he was relying. The evidence shews that he had a letter in hand. He dictated to the stenographer for plaintiffs' counsel the part which he thought supported his contention, and purposely omitted from his dictation the part which limited the scope of the letter, thus shewing that he was doubtful as to his rights and had intent to deceive.

I see no reason for disturbing the judgment of the trial Judge, and the appeal will therefore be dismissed with costs.

---

## MANITOBA.

JUNE 9TH, 1905.

FULL COURT.

### BELL v. ROKEBY.

*Principal and Agent—Agent's Commission on Proposed Sale of Land—Finding Purchaser—Subsequent Sale to Another—Personal Liability of Defendant for Commission—Property Standing in Name of Another—Interest of Defendant—Special Circumstances.*

This action was originally brought against R. T. Rokeby, to recover a commission alleged to be due by him to plaintiff on an alleged contract of employment to find a purchaser for lot 14 D. G. S. Headingly, at a price to be approved of by Rokeby, plaintiff alleging that he did find and produce a

Digitized by Google

purchaser able and willing to buy on terms agreed to by Rokeby.

Plaintiff set the action down for trial, but when the case was called on 31st May, 1904, he got a postponement, to enable him to amend by adding a party defendant. He did amend by adding, as such party, the Rev. H. R. Rokeby, the father of the original defendant. The newly added defendant entered no defence, and judgment was not signed against him. Plaintiff again set the case down for trial. When it came on to be heard, plaintiff was allowed to discontinue as against the Rev. H. R. Rokeby, thus leaving, as sole defendant, the original defendant, R. T. Rokeby, hereinafter referred to as the defendant.

The facts were that, after some negotiations, during which defendant became aware that plaintiff was trying to procure a purchaser for the land, in return for which he was to be paid a commission if he did procure one that defendant would accept, and during which defendant had stated the price at which the land was held to be $15 per acre, plaintiff procured a person who was willing to buy for $12 an acre, all to be paid on getting a transfer and a good title.

Plaintiff then, on 16th May, 1903, wrote to defendant as follows:—

"I have just received a solid offer of $12 per acre for your Headingly farm, paid in cash." . . . "If accepted, instruct your solicitors here to carry out the deal, and instruct them to pay the 5 per cent. commission."

On 19th May defendant replied that he could not sell for less than $15 per acre without consulting his father—that he was writing to his father about it, and on getting his reply would let plaintiff know if the father was disposed to accept the offer.

Prior to the procuring of his proposing purchaser, plaintiff had been informed by defendant that the land was the property of the father.

On 23rd May, 1903, defendant wrote to plaintiff as follows: "I have heard from my father that he will accept $12 per acre for the Headingly farm. As you know, James Scott has this farm in hand for sale, and I have written to him to take the matter up with you. Will you, therefore, please call on him and arrange regarding commission, as of course I cannot afford to pay more than one commission. No doubt he will agree to divide with you."

Digitized by Google

The land referred to as the "Headingly farm" was lot 14 D. G. S. Headingly. Apparently the registered title to it stood in the name of defendant's father. Defendant held a power of attorney authorizing him to sell the father's lands.

Plaintiff did not go to Mr. Scott, nor did Mr. Scott go to plaintiff.

On 1st June, 1903 (and after receipt by plaintiff of defendant's letter of 23rd May), plaintiff and his purchaser went to the office of Messrs. Howell, Mathers, & Howell, whom plaintiff believed to be defendant's solicitors. The purchaser then paid to Messrs. Howell & Co. $500 on account of the purchase, and stated his readiness to pay the balance as soon as title could be made to him. He was able to pay the balance of the purchase money at any time. Mr. Howell's firm, on the same day, by letter reported to defendant the receipt of the $500, and sent him, for execution, a transfer of the land to the plaintiff's purchaser.

About 28th May, 1903, defendant received from Mr. Scott (referred to in the letter of 23rd May) a telegram to the effect that he, Mr. Scott, had sold the land for $12 an acre, cash. Defendant on 1st June, 1903, replied by letter accepting that sale. Later on he carried it out (the purchaser not being the one procured by plaintiff), and caused a commission of 5 per cent. to be paid to Mr. Scott for procuring it. He did not notify plaintiff of Mr. Scott's offer or his acceptance of it. The deposit of $500 was subsequently returned to plaintiff's purchaser.

The case was tried before RICHARDS, J., who was of opinion that defendant R. T. Rokeby was contracting on his own behalf with plaintiff, and entered judgment for plaintiff (ante 124.) Defendant appealed.

H. M. Howell, K.C., for defendant.

T. M. Daly, K.C., for plaintiff.

The judgment of the Court (DUBUC, C.J., PERDUE, J.), was delivered by

DUBUC, C.J.:—The first point to be considered is, whether plaintiff was employed by defendant to find a purchaser for the property in question, and whether he found one acceptable to defendant so as to earn the commission.

The question of the employment was first mentioned at an interview between plaintiff and defendant, in New York, in February or March, 1903. The matter was afterwards

Digitized by Google

referred to by correspondence. The price asked for at first was $15 an acre. Plaintiff, by his letter of the 16th May, informed defendant that he had received a solid offer of $12 per acre in cash. On receiving that letter, defendant answered on 19th May that he would consult his father about it; and, on 23rd May, he writes again that his father will accept $12 per acre. After receiving the letter, plaintiff went with his purchaser, I. M. Ross, to the office of Mr. Howell, who was known by plaintiff to be the solicitor of defendant, and Ross handed him a cheque for $500 as a deposit on the purchase.

Plaintiff had been employed to find a purchaser, and he had found one ready and willing to purchase the farm for the price and on the terms asked for by defendant. Defendant had accepted the offer by his letter of 23rd May. It is argued that the acceptance was conditional, because in that letter he said that the land had also been in the hands of Scott for sale, and he asked plaintiff to see Scott and arrange with him about the commission. But, as he puts it, it is only a request; it is not a condition that the offer will not be accepted unless that is done. He does not tell him that the sale has to be made through Scott.

It is also contended that the sale made by plaintiff was duly completed on 1st June, when Ross handed the cheque to Mr. Howell; that Scott had in the meantime made a sale of the property and had informed defendant of it by telegram on 28th May; and that the sale by Scott had the effect of revoking the authority of plaintiff. It is laid down that where several brokers are employed independently about the same transaction, the accomplishment of the object of the agency by one operates as a revocation of the authority of the others: Am. & Eng. Encyc. of Law, vol. 4, p. 967. What was the object of the agency here? It was not to make a complete sale, because neither Scott nor Bell was empowered to sign a contract of sale. The object was to find a purchaser who would accept the terms of defendant. Plaintiff was the first to find such a purchaser. If the above principle is to be applied, it was Scott's authority which was revoked by the accomplishment of the object of the agency, and not plaintiff's. But plaintiff did more than find a purchaser ready and willing to buy; his purchaser paid $500 on the purchase to Mr. Howell, who received the money as acting solicitor or agent of defendant.

Digitized by Google

Defendant contends that he heard of Scott's sale by telegram on 28th May, and that he accepted it, while it was only on 1st June that Ross's cheque was handed to Mr. Howell. The evidence, however, does not shew that Scott's sale was in any way completed on 28th May; or that, on 1st June, it was in a more advanced stage than the sale made by plaintiff. The sale made to the purchaser found by Scott was also made through Mr. Howell, and he had not heard of it on 1st June. Defendant finally accepted the purchaser found by Scott, but he had already, by his letter of 23rd May, accepted plaintiff's offer, and consequently plaintiff's purchaser. The fact that in the letter he refers to Scott as regards the commission does not alter the main feature of the transaction. And the explanation afterwards given by defendant that, on receiving Scott's telegram, he thought the sale was made to the joint client of Bell and Scott, which meant, of course, that the purchaser was the one found by Bell, and that an arrangement had been arrived at between Scott and Bell about the commission, shewed that, at that time, defendant contemplated and intended to accept the purchaser found by plaintiff. On the above facts, I think there can be no doubt that plaintiff had done what was necessary to earn his commission.

The next point raised is whether defendant can be held personally responsible for the commission, or whether plaintiff's only recourse is against defendant's father, in whose name the property stood, and who lives in England.

Defendant had told plaintiff that the land belonged to his father. As a rule, when a person contracts in the name of another and gives the name of his principal, the contract so made is considered the contract of the principal, and involves no liability on the part of the agent: Am. & Eng. Encyc. of Law, vol. 1, p. 1119; Wright on Principal and Agent, p. 428. But it is only a general rule, and Story on Agency, 306, who lays down the same doctrine, after stating that the agent in such a case incurs no personal responsibility, adds the following qualification: "Unless the other circumstances of the case lead to the conclusion that he has either expressly or impliedly incurred, or intended to incur, such personal responsibility." At p. 309, the same author, after reviewing the law of other nations on the subject, says: "Our law does not, any more than the law of those nations, exempt the agent from personal responsibility, where he chooses, by his own act or contract, voluntarily to incur it,

Digitized by Google

or where, from his own conduct, or the form of the act or contract, it is necessarily implied or created, by operation of law."

In the present case, defendant had been, to the knowledge of plaintiff, living and working on the farm in question for a number of years. When plaintiff and defendant met in New York, plaintiff states that defendant told him he had not sold his farm at Headingly. Plaintiff says further that when he told defendant that, on his return to Winnipeg, he would try to sell his farm for him, defendant said: "Very well, if you, when you return, call in, I will give it to you." Defendant, in his evidence, says that he told plaintiff then that the land belonged to his father; this is emphatically denied by plaintiff. The trial Judge must have believed plaintiff's statements against those of defendant.

In his letter of 19th May, after receiving from him the offer of $12 an acre, defendant says to plaintiff that he is writing his father about it and will let him know. Four days after, on 23rd May, defendant writes again to plaintiff and tells him that he has heard from his father that he will accept $12 per acre; and after referring to Scott, he says: "Will you please call on him and arrange regarding commission, as of course I cannot afford to pay more than one commission." Plaintiff knew then that defendant could not have heard from his father in reply to his letter of 19th May. This rather wild and incredible statement of the defendant was such as to warrant plaintiff in believing, as he had previously believed, that the farm, though standing in his father's name, was in reality defendant's farm, or that he had an interest in it, and could sell it for whatever price and on what terms he thought proper. The other statement in the letter, "I cannot afford to pay more than one commission," leads to the same conclusion. If he had meant that the commission was to be paid by his father, he would probably have said: "My father cannot afford, or will not be disposed, to pay more than one commission." But he spoke in the first person, thus intimating that it was he who was making the deal and had control of the commission. From this, plaintiff was justified in looking to him for the commission. Lord Denman said in Jones v. Littledale, 6 A. & E. 490: "If the agent contracts in such a form as to make himself responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from responsibility." Vide also Evans on

Digitized by Google

Principal and Agent. (Am. ed.), p. 370. In Ex p. Hartop, 12 Ves. 352, the Lord Chancellor held that where an agent names his principal, the principal is responsible, not the agent; but for the application of that rule, the agent must name his principal as the person to be responsible. In this case, defendant did not mention his father as the one responsible for the commission; on the contrary, he spoke in such a manner as to induce plaintiff to believe that he, defendant, was the person to whom he should look for his commission. The same conclusion may be deduced from the nature of the transaction itself. There was nothing to induce defendant or plaintiff to suppose or intend that, after doing what was required of him, plaintiff would have to claim his commission from defendant's father, who lives in England, and to depend upon him for the same, or go without commission at all. That certainly was not the intendment or understanding between them. Everything that passed between them tended to the contrary proposition, viz., that plaintiff was to look to defendant for his commission, and that must have been implied from the circumstances of the dealing itself. Plaintiff was asked the question: "Who did you hold responsible?" His answer was: "R. T. Rokeby, of course. I always thought that he owned the farm, and I think so yet. That is my opinion," Two other circumstances seem to confirm that view. Defendant stated in his evidence that, on receiving the purchase money from Mr. Howell, he immediately remitted the amount to his father in London. He, however, some time afterwards, when Scott was claiming a balance on his commission, wrote to Mr. Howell telling him to draw on him for the amount. This shews that his statement that he had remitted the money to England, was not true; or, if it was true, that he nevertheless held himself personally responsible for the commission. In his letter to Mr. Howell of 28th September, returned with and attached to the commission evidence, defendant says: "I am anxious to settle with my father for the balance due him in connection with the sale of this property." This leads to the presumption that he had an interest in the property. And if he had, he cannot relieve himself from responsibility for the commission. One of his leters to Mr. Howell, dated 22nd September, was objected to at the trial, as privileged, and was not put in evidence; but no objection was raised against the one of 28th September referred to.

Digitized by Google

With all the above facts and circumstances before him, the trial Judge found in favour of plaintiff, and held him entitled to recover. His findings appear to me to be supported by the evidence, and I think his judgment should be upheld.

I am of opinion that the appeal should be dismissed with costs.

---

## MANITOBA.

DUBUC, C.J. JULY 8TH, 1905.

TRIAL.

### FIRST NATIONAL BANK OF MINNEAPOLIS v. McLEAN.

*Promissory Notes—Signatures Procured by Representation that Another would be Obtained—Failure to Obtain—Absence of Repudiation — Consideration — Indorsee—Holder in Due Course for Value without Notice.*

One H. G. Hitchcock, agent for McLaughlin Bros. of Minneapolis, went to Dauphin, Manitoba, in November, 1902, and induced a certain number of farmers of that locality to form a syndicate for the purchase of a stallion, valued at $3,500. An agreement dated 12th November, 1902, was prepared and signed by McLaughlin Brothers, and by 14 of the farmers. The amount was to be paid in equal yearly instalments of $875 each.

On 25th November a meeting called by Hitchcock was held, at which all the signers of the agreement were present, except M. C. Lee. Hitchcock wanted them to execute a syndicate agreement on a printed form furnished by himself and to sign the 4 promissory notes to be given for the price of the horse. They refused at first to sign, unless Lee would join with them. Hitchcock went to Lee's place to get his signature, but found that he was absent. He stated that Lee's wife had said that her husband would sign, and Hitchcock added that he would see that the notes would be signed by Lee, and that if he refused he would sue him to get his signature. On those representations the 13 farmers signed the syndicate agreement and the 4 notes. Lee was afterwards seen by Hitchcock and refused to sign the documents.

Digitized by Google

The 13 men took charge of the stallion and had the use of it for one season and a half, after which the horse died. Hitchcock left a few days after and never returned.

The action was brought against the 13 men on the first maturing note, which was payable on 1st March, 1904. The plaintiffs alleged that it was indorsed to them and discounted at their bank on 21st January, 1904, and that they became the lawful holders thereof in due course without notice. Defendants contended that the note was not complete when it was handed to Hitchcock; that it was delivered to him conditionally on the terms that it was to be signed by M. C. Lee as joint maker with them; and that plaintiffs had notice of such circumstance.

C. P. Wilson, for plaintiffs.

J. H. Munson, K.C., for defendants.

DUBUC, C.J.:—There is no doubt that the defendants were induced to sign the note sued on by the representation of Hitchcock that Lee was to sign it and be a joint maker with them. The note had, therefore, an element of deception and fraud in its inception and in the circumstances under which it was obtained. This would seem to constitute a sufficient defence under Awde v. Dixon, 6 Ex. 869; Hogarth v. Latham, 47 L. J. Q. B. 339; Ontario Bank v. Gibson, 3 Man. L. R. 406, 4 Man. L. R. 440. But there is quite a line of cases in which, owing to particular circumstances, a different conclusion was arrived at. In our Court in Merchants Bank v. Good, 6 Man. L. R. 339, Awde v. Dixon and Ontario Bank v. Gibson were distinguished, and the plaintiffs held entitled to recover.

The present case has some peculiar features which seem to place it in a different light from those referred to above. It is not the case of a lost or stolen note, or of a note delivered with some blanks to be filled in, or of an accommodation note, or of an accommodation indorsement.

In the first place, the note was on its face a regular and complete note without anything to suggest to an indorsee that there was any condition attached to its delivery, and there was also the fact that defendants received at the time mentioned full consideration for the note. The horse, for the price of which it was given, was accepted, taken charge of, and used by defendants for one season and half of another season. The horse died afterwards, but that was only an

Digitized by Google

accident, for which neither the vendors nor plaintiffs could be held responsible. In the second place, defendants signed the note while knowing that Lee was not then signing it, and there was nothing in the evidence to shew that, after ascertaining that Lee was not to be a joint maker with them, they repudiated the contract, or that they notified McLaughlin Bros. that they would have to take back the horse and that they wanted their notes returned to them. By keeping the horse and using him they adopted the contract. The fact that Lee did not sign the notes made the defendants as a whole responsible for only one-fourteenth more of the whole price than they were liable for without his signature and each of them individually for one-thirteenth part of said fourteenth. If Lee had signed and would not pay, they would be held liable to the holders of the note for the full amount of it, as they are now, with the only difference that they would be entitled to contribution and to bring an action against him for the amount of his share; but their individual and aggregate proportion of the use of the horse divided among the 13 of them became greater than if he had been owned and used by 14, so they had full consideration for the note, and their defence was more legal and technical than really meritorious. I do not say that they would not be entitled to succeed if the note was still in the hands of the payees, McLaughlin Bros., or if it was shewn that plaintiffs had notice of the circumstances under which it was obtained from them. I certainly appreciate the position of defendants in this matter; they have been deceived by Hitchcock, and they signed and handed him the note on the understanding that he would obtain the signature of Lee; they trusted him, and he was false to the trust thus reposed in him. But I cannot see that this is sufficient to prevent them from being liable to a lawful holder for value without notice.

When a bill or note is in the hands of a lawful holder in due course, it is presumed that he had a valid delivery of it, and that all prior parties to the instrument are liable to him. In such case it is for the defendant to shew that the plaintiff had notice. But when it is shewn, as here, that there was fraud or irregularity in the obtaining of the bill or note, the onus is on the plaintiff to prove that he is a holder in due course without notice: Byles on Bills, p. 146; Bailey v. Bidwell, 3 M. & W. 76.

And I agree with Mr. Munson that, in this case, the onus is on plaintiffs to shew that they became the lawful holders

Digitized by Google

of the note for value without notice. The cashier, the discount clerk, and the bookkeeper of plaintiffs have been examined. Their evidence shews that the note was discounted at plaintiffs' bank by McLaughlin Bros. in the ordinary course of their business; that the amount, less the discount, was placed to McLaughlin Bros.' credit; that the note, when it became due, was sent for collection to the place where it was payable. Jaffray, the cashier, stated that, according to the usual practice, a note, on being discounted, becomes the property of the bank which discounts it, and the bank holds both the maker and indorser liable on it. He swears positively that this note, when the makers failed to pay it at its maturity, was not charged to McLaughlin Bros. Willoughby, the discount clerk, says that the note was handed to him for discount by Jaffray, in presence of McLaughlin Bros., that it was discounted in the usual manner without anything being said about it, except that Jaffray told him that it was to be taken at its face value less discount at 6 per cent.

In the absence of any evidence to the contrary, this appears to me sufficient to shew, prima facie at least, that plaintiffs became the holders of the note without notice of anything irregular in its inception.

Under the above facts and circumstances, I think that plaintiffs are entitled to recover, and judgment should be entered for the amount of the note, with interest and costs.

---

## MANITOBA.

DUBUC, C.J. JULY 12TH, 1905.

TRIAL.

## PERRY v. MANITOBA MILLING CO.

*Contract—Sale of Goods—time of Shipment—Fulfilment of Provision—Time of Loading on Cars—Time of Receipt of Shipping Bill—Place of Weighing — Departure from Contract—Mistake—Costs.*

Plaintiff brought this action for the price of a carload of wheat sold by him to defendants. The contract, dated 26th September, 1904, set out the terms: "Grade, one northern, price 93½ cents per bushel, for 2 northern, 90½ cents, 3

Digitized by Google

northern, 85 cents; terms, Fort William weight, government inspection. Shipment first half October." The wheat was loaded on board a car at Birney, on the Canadian Northern Railway, on 13th October. The shipping bill, prepared by plaintiff, was dated the same day, but it was signed by the train conductor on 17th October, and the car was attached to the train on the same day. The bill was mailed to plaintiff, who received it on 19th October, and on the same day he handed it to Davidson, defendants' manager. The car load was inspected in Winnipeg and sent to Port Arthur, and the wheat was weighed there. Defendants refused to accept the wheat, on the ground that the terms of the contract had not been complied with, (1) because they had not received the shipping bill in the first half of October, viz., on or before the 15th; (2) because the wheat had been weighed at Port Arthur instead of at Fort William, as required by the contract.

As to the first point Mr. K. P. Stoddard, a grain merchant, who had been engaged in that business for several years in Winnipeg, stated that, according to his understanding, a contract to ship wheat during the first half of October is complied with by loading the wheat on a car on or before the 15th of that month. V. Slater, who had also been in the grain business for 6 or 7 years, said that if the wheat was loaded on the car during the first half of the month of October, he would consider it a sufficient compliance with the contract.

C. P. Wilson and F. L. Davis, for plaintiff.

F. H. Phippen and G. D. Minty, for defendants.

DUBUC, C.J.:—In Bowes v. Shand, 2 App. Cas. 455, Lord Blackburn says at p. 481: "It seems to me that where a parcel of goods is finally put on board so that the shipping is entirely completed before the 31st March, and nothing then remains but to take the bill of lading for them, there can be no doubt that that is a March shipment. The whole shipment is completed in that month." Further on he adds: "I do not think that the delaying of the bill of lading for a fortnight would make the date of the shipment a fortnight later." Lord Hatherley at p. 473 says: "I think the meaning of the word 'shipped' is sufficiently understood by this time in commerce. But, if it were needed, I think we have

Digitized by Google

sufficient evidence before us that by the word 'shipped' all the witnesses understood 'put on board.'"

Under the above judicial construction of the word "shipment" and with the evidence before me of what is understood by that term in this country, I think that putting the wheat on board within the period mentioned in the contract and not the delivery of the bill of lading, should be held a shipment in compliance with the terms of the contract. It might be different, of course, if an unreasonable delay occurred before the consignee was informed of the loading on the car, and if he was thereby seriously prejudiced. But there was no such delay in the present case. The wheat was loaded on 13th October. On 14th October plaintiff went to defendants' office and told them that the car was loaded. Slater, an employee of defendants, said that on that date he saw plaintiff, who told him of it, and that he (Slater), on that same day, communicated the fact to McBean, secretary and bookkeeper of defendants. Davidson himself admits that plaintiff called him by telephone on 15th October and told him he expected that a train would take his car that evening. All that shewed that plaintiff acted throughout with due diligence. He could not control the railway company and have the shipping bill signed by them and the car attached to a train sooner than it was done. It must therefore be held that plaintiff had complied with his contract on that point.

As to the wheat being weighed at Port Arthur instead of at Fort William, as stated in the contract, it was a technical point based on a mistake made by mere inadvertence. Fort William and Fort Arthur are two terminals of railways for shipping from this Province during the season of navigation. The Canadian Pacific Railway take all their cars loaded with grain to Fort William, and the Canadian Northern Railway take theirs to Port Arthur. There is, however, a connection at Port Arthur; as Port Arthur is farther east, a car going by the C. N. R. passes Fort William and goes directly to Port Arthur. If it is desired to take it to Fort William, it has to be sent back. Davidson said that defendants buy their wheat at 5 different stations of the C. N. R. and that their grain was generally shipped to Port Arthur. As to the weighing, it is done, as stated by C. N. Bell, secretary of the Winnipeg Grain Exchange, by weigh masters employed by the Dominion government under the same authority and direction of chief inspector, D. Horn. So, there could not be

Digitized by Google

anything gained by having the wheat weighed at one of those two places instead of at the other.

Davidson says that, in the ordinary course, a car shipped from Birney station to the Lake Terminals would naturally be sent to Port Arthur, unless otherwise directed, and that, in this case, the destination of the car was not discussed. It was he who drew and signed the contract on behalf of defendants. He says it never occurred to him at the time where the car was to be shipped, but in all probability it was intended to be shipped to Port Arthur. He does not shew or suggest any reason whatever why the words "Fort William weight" were inserted in the contract. From what he said I feel satisfied that it was by inadvertence that Fort William was written in the contract instead of Port Arthur, and that, as the car was to go to Port Arthur, it could not have been intended that the wheat should be weighed at Fort William.

Under those circumstances, I do not see how it can be held that the contract has not been complied with by plaintiff, because a mistaken expression was inserted in the contract against the avowed intention of the parties, particularly when the words were placed there by defendants' own manager.

I therefore think that plaintiff is entitled to recover. But there is a feature of this case which should not, I think, be overlooked. When plaintiff handed the shipping bill to defendants on 19th October, Davidson told him that he would not accept the wheat as of the first half of October, and there being a decline in price, he would take it at 93 cents instead of 93½ cents a bushel. Plaintiff refused. His whole claim is for $989.85, and the half cent difference amounts only to $5 and a few cents, and there was the uncertainty as to the term "Fort William weight" in the contract. Taking those facts into consideration, I think it is to be regretted that plaintiff, for the small sum of $5, of doubtful recovery, has thought fit to bring this matter before the Court, without regard to the delay, trouble, and expense which would be the consequence thereof.

In my opinion judgment should be entered for plaintiff for the amount of his claim, and interest, but, for the above reason, I think it should be without costs.

Digitized by Google

## MANITOBA.

JULY 14TH, 1905.

FULL COURT.

## CAMERON v. OVEREND.

*Slander—Words Capable of Defamatory Meaning—Question for Jury—Absence of Allegation of Special Damage.*

Action to recover damages for slander. No special damage was shewn.

Plaintiff, a salaried clergyman, living in a village in Manitoba, owed a debt to defendant, a storekeeper in the same village, and being unable to pay the debt had asked to be allowed time to do so.

An association, called the Ladies' Aid, composed of members of plaintiff's church, held a bazaar, to raise money for church purposes, other than the payment of plaintiff's salary.

Plaintiff's wife was treasurer of the association, and received the proceeds of the bazaar and held them for the association's purposes.

About the time when his wife received such proceeds plaintiff received moneys upon his stipend. Out of these latter moneys, which were his own, he paid $25 to defendant.

Two days after the bazaar and after defendant's wife had received its proceeds, and on the day of, but after, the payment of the $25 to defendant, a member of the Ladies' Aid asked defendant why he had not attended the bazaar, and was told, in reply, that he, the defendant, objected to the Camerons, meaning, apparently, plaintiff and his wife. The lady asked what defendant had against plaintiff, and defendant replied that plaintiff was untruthful and dishonest and that he drank. The lady then asked how plaintiff was dishonest, and the defendant replied: "He paid a bill this morning of three months' standing, and how could he do it unless he took the Ladies' Aid money?" He also said of plaintiff: "I believe he has taken the Ladies' Aid money." The lady testified that she understood the defendant to accuse the plaintiff of theft.

On the above being given in evidence at the trial, the trial Judge held that the words used were open to two construc-



Digitized by Google

tions, one being a harmless one, and the other imputing the crime of theft, but that the words did not necessarily imply the commission of a crime. He held that, therefore, the words were not actionable in themselves. As no special damage was shewn, he nonsuited plaintiff.

Plaintiff then applied for a new trial.

The motion was heard by RICHARDS and PERDUE, JJ.

G. A. Stewart Potts, for plaintiff.

G. A. Elliott and B. L. Deacon, for defendant.

RICHARDS, J.:—In Ritchie v. Sexton, 64 L. T 210, it was held, in the House of Lords, that where words were capable of being reasonably understood in a slanderous sense, it was a question for the jury to say if they were used in that sense.

In Simmons v. Mitchell, 6 App. Cas. 156, the Judicial Committee of the Privy Council held that where words fairly admitted of two meanings, the one being an imputation of suspicion only, and the other an imputation of guilt of a crime, it is proper to leave it to the jury to say in which sense they were uttered.

Those cases lay down the principle that I think should be followed.

With much deference, therefore, I think the nonsuit should be set aside and a new trial ordered; the costs of the appeal and of the trial already had, to be costs in the cause to plaintiff in any event.

PERDUE, J., gave reasons in writing for the same conclusion.

---

## MANITOBA.

JULY 14TH, 1905.

FULL COURT.

## HICKEY v. LEGRESLEY.

*Foreign Judgment—Action on—Defences Pleaded in Original Action—King's Bench Act, sec. 38 (l)—Construction of.*

This action was based on a judgment recovered by plaintiff against defendant in the Supreme Court of Cape Breton.

Digitized by Google

Defendant pleaded to the action a number of defences to the original cause of action on which the judgment was recovered, with a further allegation that, according to the laws of Cape Breton, the facts so pleaded would constitute a good defence to the action, as brought in Cape Breton.

It was alleged that these defences were, in effect, only a repetition of defences that were actually pleaded in the foreign Court; and, for the purposes of this judgment, it was assumed that they were as so alleged.

An application was made by plaintiff to DUBUC, C.J., in Chambers, for an order striking out the defences. Copies of the Cape Breton pleadings were verified on the application.

In answer, defendant set up by affidavit that he had fully intended to defend the Cape Breton action, but that, owing to misunderstandings, he was unable to be present when that action came on for trial, and that, as a result, the action went against him by default. He swore that he had a bona fide defence.

DUBUC, C.J., dismissed the application, and plaintiff appealed.

The appeal was heard by RICHARDS and PERDUE, JJ.

A. E. Hoskin, for plaintiff.

Philip C. Locke, for defendant.

RICHARDS, J.:—It has been repeatedly held, at common law, as varied by international comity, that a final judgment of a foreign Court is conclusive between the parties, upon the merits; and that only certain defences, such as lack of jurisdiction in the foreign Court, the fact that the defendant was not served with process and had no opportunity to defend, fraud in obtaining the judgment, or error appearing on its face, can be set up to an action on it.

Section 38 (1) of the King's Bench Act provides, however, that in an action on such a judgment, the defendant "may plead to the action on the merits, or set up any defence which might have been pleaded to the original cause of action for which such judgment has been recovered;" and further provides that the opposite party may apply to strike out such pleading "on the ground of embarrassment or delay."

Digitized by Google

With slight differences of wording, the above has been the statute law of Manitoba since 1876.

The application to strike out is based on the argument that, as the defences were pleaded in the Cape Breton action, they cannot be again pleaded here. That implies reading the words "but was not" into the statute after the words "might have been;" so as to make the second part of the operative clause read, "or set up any defence which might have been, but was not, pleaded to the original cause of action," etc.

That argument is founded on what appears to be a misconception of the decisions in Gault v. McNabb, 1 Man. L. R. 35, and Meyers v. Prittie, ib. 27.

In Gault v. McNabb the defences struck out in this Court had, as in the present case, been pleaded in the action in which the judgment sued on had been recovered. But the judgment had not there been got by default, as it was in this case. On the contrary, the defences had been fully gone into at the trial, and, after verdict, the defendant had moved for, but had been refused, a new trial. All that the report of that case shews is that the learned Judge felt that, under the particular circumstances of that case, it was useless to allow to be again set up defences which had been already fully fought out. He, therefore, struck them out, as tending only to embarrass and delay the plaintiff. There is nothing to shew that he held that the mere fact of defences having been placed on the record in the foreign Court, is, per se, a ground for striking them out when pleaded here to an action on the foreign judgment.

In Meyers v. Prittie the plaintiff, an Ontario solicitor, rendered bills of costs to his client, the defendant, and sued thereon in Ontario, and recovered a judgment by default in that action. After the judgment the defendant obtained an order to tax the bills, which order provided that, if he did so within a time limited by the order, the judgment should be reduced by the amount taxed off. The defendant did not avail himself of his privilege to tax. The plaintiff sued in this Court on the Ontario judgment, and the defendant entered an appearance and pleaded to the declaration. The report of the decision is very meagre, and, I think, misleading. It says that the Judge held that the defendant could under the order for taxation have availed himself, in Ontario, of all

Digitized by Google

the defences that he pleaded here, and struck out the defence for that reason. If that was the ground, it implied, apparently, that a defence set up, but not acted on, in the foreign action, could not be pleaded here.

The report does not purport to give the learned Judge's language in giving judgment; and I doubt if the ground stated is the one that had weight with him. There was evidence, by affidavit, to shew that the pleas were untrue in fact and that there was no bona fide defence to the action. It is probable that the learned Judge struck out the defence because he was convinced of its untruthfulness. It can not, I think, be accepted as an authority for the present plaintiff's contention.

An unreported appeal was taken to the full Court in that case, and was dismissed at the close of the argument. The ground of that dismissal can not now be ascertained, but it was probably that which is above suggested for the making of the order to strike out.

The only other case in point is British Linen Co. v. McEwan, 8 Man. L. R. 99. The only point raised in that case which need be considered in this, was whether in an action on a Scotch judgment a plea that the cause of action did not accrue within six years was good in law. Killam, J., decided that it was, holding that the words, "or set up any defence which might have been pleaded to the original cause of action," etc., meant a defence which might have been pleaded to an action in this Court on the original cause of action. But the full Court, on appeal, reversed that decision, and held that those words referred only to such defences as might have been set up in the Scotch action, and that the plea was bad for not alleging that the 6 years was a bar to the action by the law of Scotland.

The full Court expressly refrained from deciding whether such defences were limited to those that might have been, but had not been, set up in the Scotch action. Their doing so implies that they did not consider Meyers v. Prittie an authority on that point.

The question is still an open one, and I can see no reason for reading such words into the statute. The provision giving power to strike out, on the ground of embarrassment or

Digitized by Google

delay, was meant to cover cases where, as happened in Gault v. McNabb, no good result could arise from pleading as allowed by the prior part of the statute.

The meaning of the words "plead to the action on the merits" is not in question in this case. That meaning has perhaps been passed upon, by implication at least, by the decision of the full Court in British Linen Co. v. McEwan, and I am not now attempting to override anything in that decision. I refer to those words only to shew why I think that decision truly states the meaning of the words that follow the word "merits."

It seems to me that the legislature manifestly intended to give to any one coming here from another province, or country, who should be sued here on a judgment of any Court of such other province, or country, the benefit of all defences which he could have set up, if sued here on the original cause of action, and at the same time thought it would be inequitable, when so enacting, to deprive him of any defences which he could have set up in the original jurisdiction where the liability, if any, has been incurred. I am of opinion that in order to carry out such intention, the words "plead to the action on the merits" were enacted to cover the former object, and the words which follow "merits" were enacted for the latter purpose. The method of pleading a defence, which is available because of its being good under a foreign law, is to set out the facts, and to state, as has been done in this case, that they constitute a defence under such foreign law.

A defence, in form available at law, should not be struck out without very strong grounds for so doing. The mere fact that the defences set up here were put on the record in the Cape Breton action, does not seem to be sufficient ground, in view of sec. 38 (l) of the King's Bench Act, for striking them out as having been pleaded to embarrass or delay.

I would dismiss the appeal; costs to be costs in the cause to defendant in any event.

PERDUE, J., gave reasons in writing for the same conclusion.

Digitized by Google

## MANITOBA.

JULY 14TH, 1905.

FULL COURT.

## WINNIPEG LAND AND MORTGAGE CORPORATION v. WITCHER.

*Landlord and Tenant — Expiry of Lease—Tenant Holding over — Creation of New Tenancy — Increased Rent — Presumption—Intention of Parties.*

County Court appeal. The action was brought to determine whether defendant occupied the premises rented to her under a tenancy from year to year, or under a monthly tenancy. She had first held the premises under a lease for a year, which expired on 1st March, 1904, paying a monthly rent of $25. After the expiration of the lease nothing seems to have been done about the future holding until 29th March, when the landlord's agent notified defendant in writing that, after 1st May following, the rent was to be $30 a month. Defendant did not demur at the time, and paid the rent for May and June at the new rate of $30 a month. Then, after taking advice, she considered that she might hold the premises under a yearly tenancy at the old rate of $25 a month, and refused to pay more.

The County Court Judge entered a verdict for plaintiffs for $50, and they appealed to the full Court, contending that the verdict should have been for $60.

H. M. Howell, K.C., for plaintiffs.

G. A. Elliott, for defendant.

The judgment of the Court (DUBUC, C.J., PERDUE, J.), was delivered by

DUBUC, C.J.:—There was some discrepancy in the evidence of Lightcap, the landlords' agent, and that of defendant.

Lightcap said that, prior to the expiry of the term under the lease, Mrs. Witcher asked him for a renewal of the lease for another year, and that he told her that the landlords would not renew the lease. When she was asked about this, Mrs. Witcher did not directly contradict the agent. She

Digitized by Google

said: "I think Mr. Lightcap is mistaken there. I do not remember of ever having any conversation about the lease before the rent question was raised." She said that she never asked Lightcap for a renewal of the lease.

When a lease expires and the tenant remains in occupation and continues to pay rent to the landlord on the terms of the previous lease, it is ordinarily a question of intention whether the rent is paid by the tenant and received by the landlord under a tenancy from year to year or otherwise. Such payment at the previous rate does not by itself create the tenancy, but is simply evidence from which the Court or jury may find the fact: Idington v. Douglas, 6 O. L. R. 266, 2 O. W. R. 734. It is also held in that case that tenants who, on expiry of the lease, are permitted to continue in possession pending a treaty for a further lease, are not tenants from year to year, but tenants at will. It is clear that the fact of holding over by the tenant after the expiry of the term, does not by itself constitute a tenancy from year to year. The question depends upon the circumstances of the case and the particular dealings between the parties. Woodfall on Landlord and Tenant, at p. 233 says: "Where a tenant for a term of years holds over after the expiration of his lease, he becomes a tenant on sufferance; but where he pays, or expressly agrees to pay, any subsequent rent, at the previous rate, a new tenancy from year to year is thereby created upon the same terms and conditions as those contained in the expired lease so far as the same are applicable to and not inconsistent with a yearly tenancy. This, however, appears to be a matter of evidence rather than of law." In Elgar v. Watson, 1 Car. & M. 494, it was held that where a tenancy is continued beyond the time for which the premises were originally taken, and nothing is arranged respecting the amount to be paid on the new holding, that new holding is not of necessity to be on the same terms as the former, but the jury may give the landlord a larger sum for occupation, if there be circumstances to shew that such increased rent was expected by him in the tenant holding over, and that such expectation was known to and not repudiated by the tenant.

In the present case, the tenant continued to occupy the premises after the lease had expired. But on 29th March, before any future rent was due or paid, she received notice that after the 1st May the rent would be increased to $30 a month. Until that notice was given she certainly cannot be

Digitized by Google

considered to have held under a tenancy from year to year at the old rate. Whether, after she received that notice, she could consider herself from that time a tenant from year to year at the increased rent, is another question which need not be determined in this case, because another year has now expired, and it is to be presumed that new arrangements have been made for future holding. But it seems clear to me that, at the time the notice was given, defendant could not claim to be holding the premises under a tenancy from year to year at the previous rent. She was only holding under a tenancy at will, and the landlord had the right to increase the rent as he did by his notice. She acquiesced in it by paying two months' rent at the increased rate. She afterwards contended that she had done so under misapprehension of her rights in the matter; but I do not see that she had such rights as she is now claiming.

The learned County Court Judge did not make a special finding of fact. The action was for two months' rent, and he just gave judgment for $50, thus upholding the contention of defendant that she was entitled to hold under a tenancy from year to year at the old rent. We need not therefore be influenced by any finding of the trial Judge.

In my opinion, plaintiffs are entitled to recover for the rent at the increased rate, and the appeal should be allowed with costs.

---

## MANITOBA.

JULY 14TH, 1905.

FULL COURT.

## FONSECA v. LAKE OF THE WOODS MILLING CO.

*Negligence — Unsafe Premises — Invitation — Unguarded Hole in Floor—Absence of Warning—Notice of Danger from Circumstances.*

Plaintiff was a contractor for constructing and repairing roofs of buildings.

Defendants owned a building used as a flour warehouse and for storing wheat. A room called a cupola had been built on top of part of the roof of the building. There was a window at the northerly end of the cupola, and one at the

Digitized by Google

southerly end. There was an unguarded hole in the cupola floor, made to let light down to the floor below. The northerly edge of the hole was about 2 feet south of the northerly wall of the cupola. Its westerly edge projected about 3 inches beyond a line drawn south from the easterly edge of the window. The size of the hole appeared to be 2 feet 2 inches from north to south and 1 foot 8 inches from east to west. Entrance to the cupola from the floor below was had through another hole in the cupola floor, adjoining the westerly wall. That hole was reached by climbing a ladder of cleats, nailed on the westerly wall of the storey below. Defendants' construction foreman asked plaintiff to go up with him to the cupola, to look at the roof of the main building, which could be seen from the northerly cupola window. He wished to shew plaintiff what repairs the roof needed, with a view to employing him to make such repairs. They ascended to the cupola by the cleat ladder, and crossed to the northerly window, from which they viewed the roof. As they turned to go back to the ladder, plaintiff, who had not noticed the hole near the northerly window, fell through that hole to the floor below, and was injured.

The evidence shewed that there was plenty of light and that plaintiff could easily have seen the hole, if he had looked where he was going.

This action was brought to recover damages for plaintiff's injuries, plaintiff alleging that they were the result of negligence on the part of defendants, in not guarding the hole, or on the part of their foreman, in not warning plaintiff of its existence.

The trial Judge nonsuited plaintiff, who then appealed.

The appeal was heard by RICHARDS and PERDUE, JJ.

H. W. H. Knott, for plaintiff.

C. P. Wilson, for defendants.

RICHARDS, J.:—Plaintiff contends that, as he was invited to go into the cupola, he had the right to assume that he would be notified of any danger.

The cases relied on in support of the appeal are cases where persons have been injured in shops, or offices, or other places of ordinary resort for the purpose of doing business with occupants of the premises. In such cases the very fact of their frequent use makes it negligence not to guard holes

Digitized by Google

or trap doors in floors. A person who goes there by invitation, has the right to expect that such negligence does not exist there, and is, for that reason, not called upon to be on his guard against it. Here the case is different. The place was one, as plaintiff must have known, which was seldom entered. Plaintiff was accustomed, from the nature of his occupation, to go upon roofs, and into attics and unused and unfloored places, where holes and trap doors might exist. He, therefore, necessarily knew that a person entering such places should do so with care, and should look where he was going. Though the foreman would have acted wisely if he had shewn the hole to plaintiff, he was justified, I think, in assuming that plaintiff, from his knowledge of such places, would look out for himself.

A person invited to go upon premises is not thereby insured against injuries. The utmost he can claim is protection against dangers that, from the nature of the premises, he has a right to suppose do not exist there, and which, as a result of so supposing, he does not see in time to avoid injury. I have not found any English or Canadian cases in which the circumstances resembled those in the present case. The only one that I have seen that applies, is Johnson v. Ramberg, 51 N. W. Rep. 1051, a decision of the Supreme Court of Minnesota in appeal. There the defendant, a retail merchant, had a storeroom, one side of which adjoined and opened into his shop. On its other side was an open place where his customers tied their horses. There was a door in the storeroom, at the side next to this tying place. Those of defendant's customers who used the tying place frequently, for convenience, instead of going around to the front of the shop, entered the last named door and crossed the storeroom to the shop. Plaintiff, who was one of defendant's customers, while so crossing the storeroom, fell into a cellar, through an open door, which he could easily have seen if he had looked where he was going. He was held not entitled to damages, as his knowledge that he was crossing a storeroom made it incumbent on him to look out for dangers ordinarily incident to such a place.

The principle there laid down seems to me to be the true one to apply in the present action.

I would dismiss the appeal with costs.

PERDUE, J., gave reasons in writing for the same conclusion.

Digitized by Google

## MANITOBA.

JULY 14TH, 1905.

FULL COURT.

### GIBSON v. COATES.

*Promissory Note—Fraud or Duress—Bills of Exchange Act, sec. 29—Holder in Due Course—Value — Good Faith—Notice of Defect — Note Payable to Bearer — Restrictive Indorsement.*

County Court appeal.

The action was brought on a promissory note made by defendant, of which the following is a copy:—

"$250. Carman, Nov. 7th, 1903.

"Ten months after date I promise to pay to the order of T. F. Higgins or bearer at the Union Bank of Canada the sum of two hundred and fifty dollars with interest at the rate of —— per cent. per annum until due and —— per cent. after due until paid, value received. W. Coates."

Upon the back of the note there was indorsed the following memorandum: "I hereby agree to leave this note with John Burnett and anything he does with same will be satisfactory to me. T. F. Higgins."

The note was transferred by delivery, and before maturity, by Higgins to one Buchanan, by Buchanan to Dunbar, and by Dunbar to plaintiff.

The County Court Judge gave judgment for defendant, and plaintiff appealed.

The appeal was heard by RICHARDS and PERDUE, J.J.

J. A. M. Aikins, K.C., for plaintiff.

H. M. Howell, K.C., for defendant.

RICHARDS, J.:—The evidence before us on appeal, consisting of the trial Judge's notes of the evidence, leaves it doubtful what was the consideration for the note.

Higgins had been arrested on a charge of theft from one Ray. The charge had been dismissed. He, apparently, suspected defendant of being the thief. At an interview between defendant and Higgins and one Burnett, Higgins succeeded

Digitized by Google

by threats of arrest and prosecution in getting the defendant to make the note.

It is not clear whether Higgins believed that defendant had procured his, Higgins's, arrest, or, believing defendant to be guilty, supposed him thereby liable to an action by any other person arrested on the charge, or without believing himself legally entitled to any claim, nevertheless determined to exact compensation for an arrest that, but for the theft, would not have happened. As the learned Judge has found for defendant, I must, I think, assume that he found that Higgins did not believe himself to have a legal claim. The evidence seems to me to fairly bear out that finding. Section 29 of the Bills of Exchange Act, 1890, provides that the holder of a bill in order to be a holder in due course, must, among other requisites, have taken it in good faith, and for value, and must, at the time it was negotiated to him, have had no notice of any defect in the title of the person who negotiated it. Section 30, after stating that every holder of a bill is prima facie deemed to be a holder in due course, says: "But if, in an action on a bill, it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof that he is such holder in due course shall be on him, unless and until he proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill by some other holder in due course."

If the trial Judge took the view above suggested, that the note was asked for and given merely to prevent Higgins from prosecuting defendant for theft, then he was bound, I think, to hold that the onus was on plaintiff either to shew himself the holder in due course, or prove that value had been given, in good faith, by some former holder in due course, and that, failing such, plaintiff's action must fail. Plaintiff swears that he got the note from Dunbar in exchange for a team of horses. But he does not say that he took it in good faith, or that, at the time it was negotiated to him, he had not notice of the defect in the title. He, therefore, does not meet the onus imposed by sec. 30, and shew himself a holder in due course.

It is said, however, that Buchanan and Dunbar were holders in due course and gave value, in good faith, for the note.

Digitized by Google

Dunbar may be disposed of shortly. The evidence shews that the note was handed to him by Buchanan to trade on Buchanan's behalf to plaintiff for the team of horses, and that he, Dunbar, delivered the team to Buchanan, and that his, Dunbar's, own note for $85, which, in addition to the note in question, was given to plaintiff for the team, was paid by Buchanan. He was clearly only Buchanan's agent. There is evidence that Buchanan gave some value, but there does not seem to me to be definite affirmative evidence that he took the note in good faith and without notice of any defect in Higgins's title.

Buchanan says that he had not heard there was anything wrong about the note, that Higgins did not say there was anything wrong about it, that he thought it was all right or he would not have taken it, and that he thought it was good to collect. All that is consistent with his knowing the circumstances under which the note was made, but supposing that they did not invalidate it; and I think it should be assumed that the trial Judge so held. If so, the plaintiff fails to shew Buchanan a holder in good faith and without notice. In any event, the learned trial Judge was not bound to believe Buchanan's evidence. It is true that it was uncontradicted; but the knowledge of his position was in Buchanan's breast only, and therefore could not be met with contradictory testimony.

As to the ground that the defence under sec. 30 of the Bills of Exchange Act, 1890, was not set up by the dispute note, I think that question cannot be raised now, even if valid at any time, in view of the wording of the grounds of defence. The objection was not taken at the trial, and it has not been taken in the grounds of appeal. On the contrary, the grounds of appeal imply that that defence was duly raised.

I would dismiss the appeal with costs.

PERDUE, J., gave reasons in writing for holding that there should be judgment for plaintiff for $250 and interest at 5 per cent. since 7th November, 1903, with the usual costs in the County Court and the costs of the appeal. A promissory note payable "to the order of T. F. Higgins or bearer" is the same in effect as if it read "to T. F. Higgins or bearer." It was one payable to bearer and did not require indorsement to make it negotiable. It was impossible to hold that the memorandum indorsed on the note formed a part of the note.

Digitized by Google

or was to be read as a restrictive indorsement. There was not anything suspicious in the indorsement which would lead a purchaser to inquire into the circumstances under which the note was made, or would put him on inquiry. If he found the note in the hands of Higgins, the payee, as Buchanan in point of fact did find it, he might very well believe that it had been placed in Burnett's hands for a temporary purpose, that this purpose had been fulfilled, and the note had been restored to the payee.

As the Court was divided in opinion the appeal was dismissed without costs.

---

## MANITOBA.

JULY 14TH, 1905.

FULL COURT.

### REX v. NUNN.

### RE ROGERS AND NUNN.

*Municipal Corporations — By-law Regulating Erection and Repair of Buildings — Powers of Municipality—"Erection"—Municipal Act — Submission of Plans—Validating Statute — Quashing Conviction — Prohibition to Magistrate—Costs.*

Rule nisi for a writ of certiorari to bring before the Court a conviction, dated 8th March, 1905, made by the Winnipeg police magistrate, whereby R. J. Nunn was convicted of having unlawfully commenced the repair of a building without first having submitted the plans and specifications of the proposed repairs to the inspector of buildings for inspection, and without obtaining the inspector's written certificate that the proposed repairs were in compliance with the provisions of by-law No. 1615 of the city of Winnipeg.

And rule nisi to restrain the same magistrate from hearing and adjudicating upon a charge laid by the same inspector against R. H. Nunn, for having unlawfully re-erected a building contrary to the by-law.

Digitized by Google

The two rules were argued before RICHARDS and PERDUE, JJ.

J. E. O'Connor, for Nunn.

I. Campbell, K.C., for the magistrate and Rogers.

RICHARDS, J.:—The building is the same in both cases, and is a wooden one. Though it was not admitted on the argument to be within the Winnipeg fire limits, I shall assume, for the purposes of this judgment, that it is.

The by-law was enacted 8th May, 1899. The amendments made to the Municipal Act by that year's statutes did not come into force till some weeks after the by-law was passed. Therefore, the only authority that can be relied on to support the by-law is contained in sub-secs. (a) and (b) of sec. 607 of ch. 100, R. S. N. 1892, as amended prior to 1899.

With such amendments, sub-sec. (a) gave the city power to pass by-laws for regulating the erection in specified parts of the city of wooden buildings or additions thereto or alterations thereof, and for prohibiting the erection of buildings with the walls other than of brick, iron, or stone, within defined areas, and for regulating the repairing or alteration of roofs or external walls of existing buildings within the said areas, so that the said buildings might be more nearly fireproof. Sub-sec. (b), with such amendments, enabled the city to pass by-laws for regulating the size and strength of walls, beams, joists, rafters, and roofs. and their supports, in all buildings to be erected or repaired or added to, and for compelling production of the plans of all buildings for inspection and for the observance of such regulations.

The sections of the by-laws relied on are Nos. 5, 62, and 56.

Section 5 provides that no person shall commence the repair of any old building, where the costs of such repairs exceed $100, until he shall have submitted the plans and specifications for the proposed repairs, and obtained the inspector's certificate that the repairs do not violate any city by-law or regulation relating to prevention of fires or erection, repair, or alteration of buildings.

Section 62, for the purposes of this case, may be considered as, in effect, similar to sec. 5, except that it places no minimum cost limit and is confined, in effect, to buildings within the city fire limits.

Digitized by Google

Section 56 purports to enact that any repairs to a building, which it will be necessary to execute to the extent of 40 per cent. of the actual value of the building, shall be considered a re-erection thereof.

The building in question was erected prior to the enacting of the by-law, and was damaged by fire after such enactment. Nunn, its owner, made repairs costing less than $100. His tenant made other repairs, the value of which is not shewn.

Section 56 is clearly ultra vires. The city had no power to interpret the meaning of "erection" or "re-erection," or to say that such shall include "repairs." The legislature left the word "erection" to be dealt with according to its ordinary meaning. The section is an attempt to seize and exercise, as to certain repairs of buildings, the powers of prevention and prohibition, which were only given as to erections, additions, and alterations of buildings.

Dealing first with the rule for a certiorari, and assuming, for the purposes of this judgment, that the word "plans" includes "specifications," the power to enact secs. 5 and 62 of the by-law, in order to be valid, must be found in sub-sec. (b) of sec. 607 of the Act.

That sub-section refers to regulating the size and strength of walls, beams, joists, rafters, and roofs, and of their supports. It seems to me that, though rather generally worded, the powers given by that sub-section to require production of plans are limited to cases of regulating the size and strength of walls, etc., and do not extend to matters not provided for by that sub-section.

The evidence adduced before the magistrate does not shew that the size or strength of any wall, beam, joist, rafter, or roof, or support, was in question, or that the repairs to the building referred to, or affected, any such matter. The evidence, too, does not shew that the repairs in any way affected roofs or external walls, which are the only repairs referred to in sub-sec. (a) of sec. 607. I do not find any provision of the Act giving power to require the getting of the inspector's certificate. But, assuming that to be incident to the submission and approval of plans, it can not be required where there is no power to require plans to be submitted.

Sections 5 and 62, in requiring the submission of plans for all kinds of repairs, clearly exceed the powers given to the city, and are inoperative.



Digitized by Google

Section 6 of the Winnipeg charter passed in 1902, is cited as validating all then existing by-laws of the city. That section seems to be merely an actively continuing enactment, and to merely provide that the then existing by-laws shall stand as they stood before the passing of the charter. It could never have been in the contemplation of the legislature to validate such a body of subordinate legislation as the city council might have passed, without first carefully examining all the by-laws, to see that the limits of jurisdiction had not been exceeded; such an intention could only be presumed from clear and distinct enactments, open to no other construction.

It is also urged that, since the amendment of 1899 to the sub-sections in question, the city have had power to enact such clauses of the by-law as are now in question, and that, as they, since then, have amended certain other clauses of the by-laws, they have thereby treated the whole by-law as in force and in effect have re-enacted it.

It is not, I think, necessary to consider the powers given by the Act of 1899. The subsequently amended clauses admittedly do not affect in any way the operation of the sections now in question. The by-law is not an enactment all the parts of which are necessary to each other's working. Though it is limited to certain subjects, many large parts of it might be omitted without affecting the working of other portions.

I am of opinion that Nunn has established his contention that there was no power to require him to submit plans or specifications, or to obtain the inspector's certificate, and that he is entitled to have his rule made absolute for the writ of certiorari. Counsel having agreed that in such case the conviction may (in order to save costs) be dealt with as on the return of the writ, I think there should be a rule absolute to quash the conviction.

In the prohibition case the prosecution I think will not lie, as sec. 56, on which it depends, as stated above, is, in my opinion, ultra vires. I would make the rule absolute to prohibit the magistrate from further proceeding with the hearing of the case.

As the inspector was merely carrying out his duties as prescribed by his employers, and as it would not have been proper for the magistrate to deal with the question whether

Digitized by Google

the sections of the by-law were ultra vires or not, there should, I think, be no costs allowed in either case.

PERDUE, J., gave reasons in writing for the same conclusions.

---

## MANITOBA.

JULY 14TH, 1905.

FULL COURT.

### WRIGHT v. BATTLEY.

*Replevin—Land Scrip—Right to Possession of Document—Assignment—Invalidity of, as Transfer of Right to Locate Land.*

Action of replevin. Plaintiffs alleged that in December, 1903, at the Dominion Land Agent's office at Wapella, defendants took out of plaintiffs' possession, two scrip, relating to 160 and 80 acres of land, to which plaintiffs were entitled, and they asked that the same might be returned.

Defendant William Battley set up that plaintiffs had no legal or beneficial interest in the scrip in question, and defendant Annie Battley asserted that she was the only person entitled to the scrip, but that it was never in her possession.

The action was tried before PERDUE, J., who entered judgment in favour of the plaintiffs.

Defendants appealed.

G. A. Stewart Potts, for defendants.

C. W. Bradshaw, for plaintiffs.

The judgment of the Court (DUBUC, C.J., RICHARDS, J.), was delivered by

DUBUC, C.J.:—The only point raised on this appeal is, whether the contract made by defendant Annie Battley in selling her land scrip to plaintiff McMeans, was a valid contract, or whether it was illegal and void. It is admitted by

Digitized by Google

defendants that if she had the power to assign the scrip, she had done so.

It is contended on her behalf that the order of the Governor-General in council, under which scrips were allotted and afterwards issued to the children of half breeds, empowered the half breed commissioner to authorize the delivery of money scrips on powers of attorney, or assignments duly executed by the allottees, but that, in the case of land scrips the commissioner had no authority to accept or act upon such assignments or powers of attorney.

In favour of that contention it is argued that the issue of the scrip by the Dominion government was in the nature of a bounty to the half breed personally, and that he had no power to assign or transfer the same.

The order in council relied on by defendants is dated 6th June, 1903.

That order in council has, no doubt, the effect of preventing the commissioner from recognizing or accepting assignments of land scrips, and from delivering such scrips to the assignees thereof. It might be a matter of policy adopted by the government for the protection of the half breed; they might attach to the grant the condition that no one but the half breed himself will be recognized and allowed to locate the scrip allotted to him; but that cannot affect the right of the allottee, after he has received his scrip, to do as he chooses with it; he may locate it or not, he may keep it or dispose of it. When in his hands the scrip, as a scrip, is his absolute property.

In this case, if Mrs. Battley refuses to locate the scrip, the purchaser and assignee thereof may find himself unable to get the land intended to be covered by the scrip, or to derive any benefit therefrom.

But, as to the scrip itself, he has purchased it; Mrs. Battley, on whose order it has been delivered, while knowing that it was already in McMeans's possession, has deliberately assigned it to him for valuable consideration; that certainly amounted to a formal delivery by her to him. Such a transaction should not, in my opinion, be held illegal and invalid. Whatever the government may do or refuse to do, in regard to

Digitized by Google

the scrip, or to the location thereof, it has become the property of McMeans and his assigns.

The present case has nothing to do with the lands. The possession of the scrip alone is in issue. As it has been wrongfully taken from the plaintiffs, they are entitled to recover it, and the action of replevin ought to be maintained.

This being the conclusion arrived at, it is not necessary to decide the objection raised on behalf of the plaintiffs that the defence of illegality not having been pleaded, ought not to be entertained. I think the judgment of my brother Perdue should be upheld, and the appeal dismissed with costs.

---

## MANITOBA.

PERDUE, J. JULY 14TH, 1905.

TRIAL.

### JOHNSTON v. HURB.

*Contract—Sale of Goods—Refusal to Complete Delivery—Breach—Damages—Measure of.*

Action for breach of contract. Defendant, who was a miller at Carberry, Manitoba, entered into an agreement with plaintiffs, who were bakers carrying on business at London, Ontario, to deliver to plaintiffs, at London or St. Thomas, 20,000 sacks of flour at $1.70 per sack. The flour was to be delivered in shipments of not less than 410 bags weekly, or more if the trade required, and all was to be delivered by 15th September, 1903. Plaintiffs requested defendant to delay certain of the weekly shipments so as to enable them to get rid of the accumulation of stock. On 18th August, 1903, plaintiffs wrote to defendant offering to extend the time for the delivery of the remainder of the flour, otherwise the contract to be filled on date. To this letter the defendant replied on 24th August, stating that he was willing to extend the time for delivery of the remainder of the flour as suggested in plaintiff's letter. On 15th September defendant

Digitized by Google

wrote to the plaintiffs declining to ship any more flour under the contract.

The quantity of flour supplied under the contract was 10,915 sacks, leaving 9,085 sacks not delivered.

H. M. Howell, K.C., and J. S. Hough, K.C., for plaintiffs.

C. P. Wilson and G. Barrett, for defendant.

PERDUE, J.:—Defendant clearly appears on the evidence to be liable for breach of contract, and the whole matter to be considered is the question of damages.

Much evidence was offered as to the value of flour on 15th September, 1903, when the remainder of the flour under the contract should have been delivered.

The quality of the flour as specified in the contract was "80 per cent. first patent flour made from all Manitoba number 1 hard wheat (crop of 1902)." It appears that this 80 per cent. first patent flour is a very unusual grade and the exact value is difficult to fix. The quality of the flour supplied on the contract by defendant seems to have given plaintiffs complete satisfaction.

As a matter of fact defendant furnished to plaintiffs, under the contract, what was in reality a 90 per cent. flour, that is to say, 90 per cent. of the product of the wheat went into the flour, only 10 per cent. being rejected. In an 80 per cent. grade, 20 per cent. of the total product should be removed in the process of manufacture, leaving 80 per cent. of the choicest part of the wheat. The quality of the flour varies according to the percentage rejected in milling, and also according to the grade of the wheat used.

After carefully considering the evidence, I have come to the conclusion that the value of an 80 per cent. wheat of the quality specified was, on 15th September, 1903, $2.15½, at London or St. Thomas. This price included the sack, worth 8½ cents. Deducting the value of the sack, the net price of the flour would be $2.07. This leaves a difference of 37 cents per sack between the price mentioned in the contract and the value of the flour at the time of the breach complained of. Plaintiffs are therefore entitled to 37 cents per sack on 9,085 sacks, or $3,361.45, for which amount there will be judgment with costs.

[See Johnston v. Hurb, 3 O. W. R. 192.]

Digitized by Google

## BRITISH COLUMBIA.

### (VICTORIA.)

JULY 3RD, 1905.

FULL COURT.

## ALASKA PACKERS' ASSOCIATION v. SPENCER.

*Trial — Jury—Previous Order not Appealed against—New Trial—Method of Trial—Provisional Order—Rule 683—Appeal.*

Appeal by plaintiffs from order of MARTIN, J., ante 188.

The appeal was heard by HUNTER, C.J. IRVING, J., MORRISON, J.

E. V. Bodwell, K.C., for plaintiffs.

F. Peters, K.C., for defendant.

IRVING, J.:—Some two years ago I made an order for the trial of the action by a jury, at the instance of defendant; no appeal was taken from that decision; and I have no recollection of there being any strenuous opposition offered to the order applied for. The trial took place before me with a jury, and there was an appeal to this Court, when the majority of this Court came to the conclusion that there had been misdirection and nondirection, and ordered a new trial. In that judgment my Lord suggested that the Court as constituted was not a suitable tribunal for the trial of the action, and suggested there should be a trial before a Judge with assessors. We have not that system in force in this Province, and that cannot be carried out.

My brother Drake, who thought that on the trial before me the jury was properly and sufficiently instructed, expressed no opinion on that point, but from the fact that he was in favour of dismissing the appeal I conclude that he arrived at the conclusion that it was a proper case for a jury.

My brother Martin, on the other hand, said that it was decidedly a case for a jury. [See 10 B. C. R. 473.]

Well, the case then went to the Supreme Court of Canada, and the Judges of that Court were all in favour of a new trial except one, Sir Louis Davies. [See 35 S. C. R. 362.]

Digitized by Google

An expression in Mr. Justice Nesbitt's judgment seems to point to the fact that he had no doubt whatever that the next trial would take place before a jury.

Now, in these circumstances, Mr. Bodwell took out a summons to get rid of this jury that I ordered. The summons came before my brother Martin, who dismissed it on the ground that he had no jurisdiction, holding that my decision was binding upon him, whatever his opinion might be; but he offered no opinion whatever. That decision comes on appeal to us.

Now, I agree with my brother Martin in this, that the order that was made two years ago has not yet been exhausted. In Loo Chu Fan v. Loo Chock Fan (1884), 1 B. C. Pt. 2, 172, decided in 1884 by the full Court, on appeal from Sir Matthew Begbie, a jury had been ordered, a trial took place, and the jury disagreed; then there was an effort made in that case to get rid of the jury, and Sir Matthew said that the second trial should take place without a jury; but on appeal to the full Court, consisting of Sir Henry Crease, Mr. Justice McCreight, Mr. Justice Walkem, and Mr. Justice Drake, the conclusion was that the order was not exhausted, that a competent tribunal had ordered that the action should be tried by a jury, that what had taken place had not exhausted the order, and therefore the matter must be tried out before a jury.

Now, I am unable to see any difference between that case and this case. There the jury were discharged because they could not agree; in this case the verdict of the jury was set aside because they had not the case put before them properly by the trial Judge. In both cases, the situation is identical, there was no proper trial, no valid conclusion, and therefore no exhausting of the order that had been made.

It seems to me highly desirable that there should be one method of practice. Here is a decision which has been in force since 1884, and I should think we ought to follow it to-day.

With reference to this order being a provisional order, an order for a jury trial may be provisional in a particular case. In this case, for instance, if there had been any amendment of the pleadings, or any change of the circumstances, it could have been set aside; but here there has been no amendment, no amendment is now suggested, nor has there been any change of circumstances. Everything that has taken place must have been in the minds of everyone at the time the

Digitized by Google

application for a jury was first made. This order, which is an order as to the method of trial, had to be determined upon the pleadings.

As to Rule 683, I do not agree with my brother Martin. He seems to think that this Court has jurisdiction under that Rule to vary the order. Now 683 is a very beneficial Rule, but I do not think that it was ever intended by 683 to abolish the time limit imposed by the legislature with reference to the time within which appeals must be brought. I do not think that Rule 683 authorizes an appeal to be heard after the expiration of two years, to determine the very question itself, and nothing more. The point that we are determining is not raised incidentally in connection with any other point. The true function of 683 is to get rid of any obstacle that incidentally arises in connection with an appeal.

MORRISON, J.:—I agree with my brother Irving as to the points referred to by him. And as to the question of this being a case which should be properly and conveniently tried by jury, I am very strongly of the opinion, from my knowledge of the facts gleaned from the counsel, and from the report before I had heard counsel, that this is a proper case for a jury. I cannot see where there is any great question of scientific investigation involved. Take the salient points emphasized by the learned counsel for the respondent himself. One strong point urged before the jury was whether the hawser was on the port or starboard bow. I do not think that would involve a scientific question, or require scientific investigation; another was as to the equipment and power of the tug. I cannot see where there is any question of scientific investigation involved in that. Then, coming down to the question of the anchor being hauled short, and as to the effect that had upon the accident, I fail to see why an intelligent jury gathered from a sea-port town cannot decide that without being embarrassed in any way. Of course all these questions are susceptible of being made intricate by one counsel or the other, or one party or the other may call a cloud of expert witnesses and throw an atmosphere of mystery and difficulty about a question. But, having regard to the prominent points which apparently the jury should have been called upon to consider, I am very strongly of the opinion that this case does not come within the line of cases cited by Mr. Bodwell.

Digitized by Google

I therefore concur with my brother Irving, that the appeal should be dismissed.

HUNTER, C.J., dissenting, was of opinion that the first order for a jury had been spent when the jury found a verdict; that at any rate the order was provisional; and, in the circumstances of the present action, the trial should be without a jury.

Appeal dismissed with costs; HUNTER, C.J., dissenting.

---

## NORTH-WEST TERRITORIES.

### (NORTHERN ALBERTA.)

SCOTT, J. JULY 4TH, 1905.

CHAMBERS.

## EGGLESTON v. CANADIAN PACIFIC R. W. CO.

## DUGGAN v. CANADIAN PACIFIC R. W. CO.

*Appeal to Supreme Court of Canada — Security — Stay of Proceedings on Judgment Appealed from—Judgment for Costs—Immediate Payment—Undertaking of Solicitor.*

Application by defendants for an order allowing their appeal to the Supreme Court of Canada from the judgment of the Court in banc in these actions, which had been consolidated, and for an order staying the proceedings in the actions pending the determination of such appeal.

C. de W. MacDonald, Edmonton, for plaintiff.

C. F. Newell, Edmonton, for defendant.

SCOTT, J.:—Counsel for defendants presented a bond covering security required by sec. 46 of the Supreme and Exchequer Courts Act, and also the security prescribed by sub-sec. (e) of sec. 47.

Counsel for plaintiffs contended that execution should not be stayed as to the costs which formed part of plaintiffs' judgment, as their advocates were entitled to immediate payment thereof, upon giving their personal undertaking for the

Digitized by Google

repayment thereof in the event of defendants succeeding on the appeal, which undertaking they were prepared to give.

In Patton v. Alberta Railway and Coal Co. (1896) I held that upon a similar appeal by the plaintiff to the Supreme Court of Canada, the defendants were not entitled to a stay of proceedings as to the costs if plaintiffs' advocates were willing to give such undertaking, and I expressed the same view in Jacklynski v. Kerrchinski (1904).

On the argument before me in the applications in those cases my attention was not called to the provisions of sec. 47 of the Act referred to. In my view, their effect is such that upon giving the security prescribed by sec. 46 and sub-clause (e) of sec. 47, defendants are entitled to a stay of proceedings in respect of the plaintiffs' whole judgment, including the costs of the action—and that the English cases upon which I based my judgment in Patton v. Alberta Railway and Coal Co. are not applicable.

As no other objection was taken to the application or to the security proffered, the order will go allowing the appeal and staying proceedings in the action pending the appeal.

---

## NORTH-WEST TERRITORIES.

### (NORTHERN ALBERTA.)

SCOTT, J. JULY 4TH, 1905.

CHAMBERS.

### REX v. AUSTIN.

*Justice of the Peace — Conviction — Information Charging more than One Offence—Trial—Jurisdiction — Amendment—Appeal.*

Appeal by defendant from a conviction made by a justice of the peace, whereby, upon the information of R. W. MacLeod, defendant was on 21st March, 1905, convicted "for that he, said Lloyd Austin, about or prior to 16th January, 1905, at Strathcona, in the North-West Territories, did practice dentistry or dental surgery contrary to the provisions of sec. 55 of an Ordinance respecting dentistry," and was fined in the sum of $10 and costs.

N. D. Mills, Strathcona, for defendant.

W. A. Griesbach, Edmonton, for prosecutor.

Digitized by Google

SCOTT, J.:—The conviction is for a breach of sec. 55 of the Dental Profession Ordinance (ch. 16 of 1903, 2nd session). The information upon which it is founded contained other charges against defendant, viz., for breaches of secs. 56 and 57 of that Ordinance. It appears from the depositions returned by the convicting justice, and which, by agreement of counsel, constituted the evidence upon the trial of the appeal, that at the opening of the proceedings before the justice, counsel for defendant took the objection that the information charged more than one offence, and that his objection was then overruled.

It further appears that at the conclusion of the case for the prosecution, the counsel for the prosecutor abandoned the charges other than that upon which defendant was convicted.

In my opinion, it was the duty of the justice, when the objection was taken, to have amended the information by striking out all but one of the charges, and to have heard the evidence upon that charge only. The fact that he overruled the objection and proceeded to hear evidence upon the three charges, renders the conviction void. See Regina v. Alward, 25 O. R. 519.

I therefore direct that the conviction be quashed; defendant to have costs of the appeal.

---

## NORTH-WEST TERRITORIES.

### (NORTHERN ALBERTA.)

SCOTT, J. JULY 5TH, 1905.

TRIAL.

### STEPHENS v. OLSON.

*Foreign Judgment—Action on—Proof of Judgment—Seal of Foreign Court—Certificate of Clerk—Proof of Identity of Plaintiffs.*

Action upon a foreign judgment.

E. D. H. Wilkins, Wetaskiwin, and O. M. Biggar, Edmonton, for plaintiffs.

C. de W. MacDonald, Edmonton, and M. E. O'Brien, Wetaskiwin, for defendant.

Digitized by Google

SCOTT, J.:—Counsel for plaintiffs tendered as evidence what purports to be a copy of a judgment recovered by plaintiffs against one Ludvig Olson on 20th May, 1901, the heading of which is as follows:

"State of Minnesota, } SS. In District Court
County of Polk. } Fourteenth Judicial District."

And upon it is a seal bearing the legend "District Court, Polk Co., Minn."

Attached to the copy is a certificate under the same seal, which is in the words following:

"State of Minnesota, } SS. District Court,
County of Polk. } Fourteenth Judicial District."

"A. D. Stephens, John Cromb, Albert Kaiser, Lewis John, D. A. Ray, and S. S. Stadsvold, co-partners doing business under the firm name and style of Bank of Fosston.
Plaintiffs
vs.
Ludvig Olson,
Defendant.
} Clerk's Certificate.

"I, Edwin E. Lommen, Clerk of the above named Court, do hereby certify that I have compared the paper writing to which this certificate is attached with the original judgment as the same appears of record and on file in the said Clerk's office, at the Court House in said county, in the above intituled cause, and that the same is a true and correct copy thereof and of the whole thereof.

"In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Crookston, Minnesota, this 2nd day of May, A.D. 1902.

"Edwin E. Lommen, Clerk; O. R. Begert, Deputy."

Counsel for the plaintiffs also tendered what purports to be a copy of the docket entry of the same judgment, upon the face of which is the following certificate under the same seal:

"State of Minnesota,
District Court, Fourteenth Judicial District,
County of Polk.

"I, Edwin E. Lommen, Clerk of the District Court in and for the county and State aforesaid, do hereby certify that the above is a true transcript of the docket entry of judgment in a case wherein A. D. Stephens et al., doing business as

Digitized by Google

Bank of Fosston, were plaintiffs, and Ludvig Olson was defendant, and the same appears of record in my office.

"In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Crookston, this 2nd day of May, A.D. 1902.

"Edwin E. Lommen, Clerk; by O. R. Berget, Deputy."

Defendant's counsel objected to the reception of these documents as evidence, on the ground that they do not purport to be under the seal of the Court from which they emanated. I thereupon intimated that I would receive them subject to the objection.

I now hold that the documents are not open to the objection urged against them. The certificates expressly state that the seal attached to them is the seal of the Court in which the judgment was obtained.

In Junkin v. Davis, 6 C. P. 408, 22 U. C. R. 369, the action was upon a judgment recovered in the District Court of the Tenth Judicial District of California. A transcript of the judgment was produced in evidence, certified by the Clerk of the District Court under a seal bearing the legend, "District Court, 14th District, Nevada County, California." There was nothing upon the face of the document to shew that the seal was the seal of the District Court of the 10th Judicial District, and no proof was adduced to shew that such was the case, and it was therefore held that the judgment was not sufficiently established. I gather from the perusal of the reasons for judgment that if the Clerk's certificate had stated, as it does in the present case, that the seal attached was that of the Court in which the judgment had been obtained, the proof would have been held sufficient.

It was further objected by defendant's counsel that, even if there were sufficient proof of the judgment, the plaintiffs must fail because there was no evidence to shew that the defendant was the person against whom it was obtained; and, even if the ordinary rule is that the similarity of name constitutes sufficient prima facie evidence, that rule should not apply in the present case because the copy of docket entry put in evidence shews that there is in the locality where the judgment was obtained another person who bears the same name as the defendant. I doubt whether it can be inferred from the docket entry that such is the case, but, even if it were so, the rule laid down in the judgment of the Court in banc in this case to the effect that the similarity of name, together with the fact that the defendant has pleaded in

Digitized by Google

confession and avoidance, constitutes sufficient prima facie evidence of identity, would still be applicable.

I give judgment for the plaintiffs for $404.75 and costs of suit.

---

## CORRECTIONS.

### ROSS BROTHERS LIMITED v. PEARSON.

In the report of this case, ante 338, the following corrections should be made.

The appeal was heard by WETMORE, SCOTT, PRENDERGAST, NEWLANDS, and HARVEY, JJ.

The judgment reported at length was given by HARVEY, J., not by SCOTT, J.

SCOTT, J., took no part in the judgment owing to illness.

NEWLANDS, J., concurred.

On p. 343, on the 5th line from the bottom, the following words should be inserted after the word "preference"—"or which has the effect of defeating . . . creditors or of giving a preference. . . ."

The counsel who argued this case were:

N. D. Beck, K.C., for appellant, and

O. M. Biggar, Edmonton, for respondents.

---

### IRELAND v. ANDREW.

In the report of this case, ante 346, it should be added that the Court was composed of SIFTON, C.J., WETMORE, PRENDERGAST, and HARVEY, JJ.

The counsel who argued this case were: H. M. Howell, K.C., and D. J. Thom, Regina, for appellant, and J. F. L. Embury, Regina, for respondents.

Digitized by Google

## REX v. CHARLES KING.

In the report of this case, ante 348, it should have been stated that the Court was composed of SIFTON, C.J., WETMORE, PRENDERGAST, NEWLANDS, and HARVEY, JJ.; and that SIFTON, C.J., and HARVEY, J., concurred in the opinion of NEWLANDS, J.

---

## EGGLESTON v. CANADIAN PACIFIC R. W. CO.

## DUGGAN v. CANADIAN PACIFIC R. W. CO.

In the report of these cases, ante 356, it should have been stated that the Court was composed of SIFTON, C.J., WETMORE, PRENDERGAST, NEWLANDS, and HARVEY, JJ.; and that WETMORE, J., delivered a dissenting judgment, in which PRENDERGAST, J., concurred.

END OF VOL. 1.

Digitized by Google

## NORTH-WEST TERRITORIES.

### (EASTERN ASSINIBOIA.)

WETMORE, J. JULY 8TH, 1905.

CHAMBERS.

## GIBSON v. DRENNAN.

*Costs — Taxation — Motion to Dismiss Action for Want of Prosecution — Interlocutory Application — Affidavit — Information and Belief — Brief and Instructions for Brief—Counsel Fee.*

Motion by plaintiff for review of taxation of costs of defendant, the action having been dismissed for want of prosecution.

J. T. Brown, Moosomin, for plaintiff.

E. L. Elwood, Moosomin, for defendant.

WETMORE, J.:—The question whether Mr. Elwood's affidavit was taxable depends upon whether the application to dismiss the action was interlocutory or final. If it was final, I am of opinion that it would be taxable, because under Rule 295 of the Judicature Ordinance, "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief with the grounds thereof may be admitted." If this application was final, as the step which was necessary to keep the action alive might be served upon Mr. Elwood, the agent of Mr. Murphy, Mr. Murphy would not be in a position to state that such step was not taken, and his information and belief would not be sufficient, and Mr. Elwood's affidavit would be necessary. But I am of opinion that this was an interlocutory application. I wish to draw a distinction between what may be called a final order and an interlocutory order; so far as the order is concerned, I am inclined to think that it was final; although the decisions in England are not altogether reconcilable, they are rather contradictory. It would be final for the purpose of making an appeal from the decision if it was intended to make an appeal; but an order may be final, it



Digitized by Google

seems to me, and the application may be interlocutory. I take it that an application would be interlocutory where the character of it was such that a final order need not necessarily be made one way or the other. If an application is made, and the result of that application, whether the Judge decides one way or whether he decides the other, would be to put an end to the action, that would be a final application, and not interlocutory. But an application like the present, where it would be only final if the defendant succeeded, and if he did not it would not put an end to the action, and, moreover, where the Judge is empowered expressly to make a contingent order making it final only on the failure of the other side to proceed within a specified time, would be an interlocutory application. I get my idea upon that largely from what was laid down in Salaman v. Warner, [1891] 1 Q. B. 734, in which Lord Esher, Master of the Rolls, lays down the following rule for the purpose of deciding what constitutes a final order for the purpose of appeal; he says: "The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purpose of these Rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other way, will allow the action to go on, then I think it is not final, but interlocutory." There is a case, however, a later case, Bosson v. Altrincham Urban District Council, [1903] 1 K. B. 547, which lays down this rule, and in which Lord Alverstone, C.J., says: "It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order." Now, that decision was given with Salaman v. Warner cited before the Court, but the Court preferred following another case, Shubrook v. Tufnell, 9 Q. B. D. 621, which was not cited to the Court in Salaman v. Warner. Now, while this is so with respect to the order being final or not, I think the rule laid down by Lord Esher for the purpose of determining whether the motion or application is interlocutory or not is the rule to follow. I hold therefore that this motion was an interlocutory motion,

Digitized by Google

and that Mr. Elwood's affidavit was unnecessary, because Mr. Murphy—he did not do so, but he could have done so in his affidavit—could have sworn to the further step not having been taken, as he was informed by his agent and verily believed, and that would have been quite sufficient in an interlocutory application, according to the rule I have stated. Therefore, the taxation of this item and all the matters connected with it were properly taxed by the clerk.

As to "instructions for brief and brief," I think the clerk discussed a matter of this sort with me, and the conclusion I reached, and which he still adheres to, is that in interlocutory matters it will be largely discretionary with the clerk whether he shall allow "brief and instructions for brief." This was a matter which went as a matter of course, and it would always go as a matter of course if the facts set forth were true, because there is only one thing the Judge can do, and that is to dismiss the action forthwith, or order it to be dismissed within a certain time if the plaintiff do not proceed in the meanwhile in the action. In this particular case there was practically no objection to the order.

I think, therefore, the clerk, in the exercise of his discretion, was correct, and on the same principle I think he was also correct in only allowing a counsel fee as in a matter of course.

Digitized by Google

Digitized by Google

# WESTERN LAW REPORTER

(CANADA).

## INDEX-DIGEST TO VOLUME I. (JANUARY-JULY, 1905.)


ABANDONMENT.

See Crown Lands.

ACCOUNT.

Stated Account — Agreement not to Sue—Further Adjustment of Accounts—Recovery on one Item—Absence of Alternative Claim on Items—Refusal to Amend: Jackson v. Drake (B. C.), 97.

See Discovery, 3—Executors and Administrators, 1 — Particulars, 1—Parties, 2.

ACQUIESCENCE.

See Landlord and Tenant, 3—Water and Watercourses, 1.

ACTION.

See Arbitration and Award—Limitation of Actions—Set-off—Vendor and Purchaser, 1.

ADMINISTRATION.

Supposed Death of Intestate — Evidence of Death — Application by Public Administrator for Letters of Administration: Re Tjerstrom (Y. T.), 385.

ADMINISTRATOR.

See Executors and Administrators.

ADMISSION.

See Judgment, 7.

ADVERTISEMENT.

See Executors and Administrators, 1.

AFFIDAVIT.

Practice — Swearing before Solicitor for Affiant — Necessity for Independent Commissioner — Determination of Question whether Commissioner Acting as Solicitor — Authority of Commissioner: Gougeon v. Thompkins (N.W.T.), 114.

See Costs, 8—Discovery — Evidence, 1, 3 — Judgment, 2 — New Trial—Parliamentary Elections, 1, 2.

AGENT.

See Principal and Agent.

ALIMONY.

See Contempt of Court, 1—Husband and Wife, 1.

ALLEGIANCE.

See Limitation of Actions, 1.

AMENDMENT.

See Account—Detinue, 1—Execution, 4—Justice of the Peace, 1—Parties, 1—Pleading, 1 — Vendor and Purchaser, 5.

ANIMALS.

See Contract—Detinue — Railway, 3, 4—Sale of Goods, 8.

APPEAL TO COURT OF KING'S BENCH, MANITOBA.

See Architect — Landlord and Tenant, 2.




Digitized by Google

APPEAL TO PRIVY COUNCIL.

Leave to Appeal—Amount Involved: Centre Star Mining Co. v. Rossland-Kootenay Mining Co. (B.C.), 326.

APPEAL TO SUPREME COURT OF BRITISH COLUMBIA.

Right of Appeal—Award—Workmen's Compensation Act: Lee v. Crow's Nest Pass Coal Co. (B.C.), 527.

See Costs, 1, 5—Principal and Agent, 2.

APPEAL TO SUPREME COURT OF CANADA.

Security — Stay of Proceedings on Judgment Appealed from — Judgment for Costs — Immediate Payment — Undertaking of Solicitor: Eggleston v. Canadian Pacific R. W. Co., Duggan v. Canadian Pacific R. W. Co. (N.W.T.), 570.

APPEAL TO SUPREME COURT OF NORTH-WEST TERRITORIES.

See Church.

APPEAL TO YUKON TERRITORIAL COURT.

1. Notice of Appeal—Extending Time — Discretion — Solicitor's Slip — Terms—Costs — Security: Alaska Mercantile Co. v. Ballantine (Y.T.), 504.

2. Security for Costs of — Time for Applying for — Application after Expiry of Time — General Rule Giving Power to Enlarge Time: Gold Run Klondike Mining Co. v. Charbonneau (Y.T.), 264.

APPEARANCE.

See Indemnity.

ARBITRATION AND AWARD.

1. Action for Money Demand—Plea of Payment of Amount Ascertained by Award—Amendment of Statement of Claim—Allegation of Invalidity of Award—Demurrer—Procedure in Attacking Award—Rules of Court—Joinder of Claim to Set aside Award with Original Demand—Equitable Jurisdiction—Time for Attacking Award: Johannesson v. Galbraith (Man.), 445.

2. Agreement to Refer—Stay of Action — Inconsistent Provisions of Agreement—Parties not ad idem: Kerr v. Brown (N.W.T.), 379.

See Appeal to Supreme Court of British Columbia — Water and Watercourses, 2.

ARCHITECT.

Action for Fees — Counterclaim for Negligence — Questions of Fact—Appeal: Russell v. McKerchar (Man.), 138.

See Contract, 2.

ASSAULT.

See Criminal Law, 5.

ASSESSMENT AND TAXES.

1. School Taxes—Returns of Treasurers of School Districts—Confirmation—Unoccupied and Unpatented Lands — Homestead Holdings — Liens of Loan Company — Constructive Occupancy: Re Attorney-General for North-West Territories and Canada Settlers Loan and Trust Co. (N.W.T.), 225.

2. Tax Sale — Refusal to Confirm—Land Vested in Crown — Recommendation of Patent for Homesteader — Costs — Witnesses: Re Cann (N.W.T.), 206.

3. Tax Sale—School Taxes—Confirmation of Sale — Time for Redemption — Extension — Terms: Re Lewis and Phalen (N.W.T.), 36.

See Will.

ASSIGNMENT OF CHOSE IN ACTION.

See Chose in Action.

Digitized by Google

ATTACHMENT OF DEBTS.

Judgment in Action for Debt or Liquidated Demand — Claim for Proceeds of Sales by Agent—Goods Sold—Rule 384: Stimson v. Hamilton (N.W.T.), 20.

See Execution, 2—Solicitor, 1.

AUCTIONEER.

See Execution, 5—Executors and Administrators, 1.

AWARD.

See Arbitration and Award.

BAILIFF.

See Execution, 5.

BAILMENT.

Hire of Horses—Negligence of Bailee —Loss—Contributory Negligence: Klassen v. Wright (N.W.T.), 158.

See New Trial.

BALLOTS.

See Municipal Elections.

BANKRUPTCY AND INSOLVENCY.

Chattel Mortgage by Insolvent Debtor —Registration—Bills of Sale Ordinance—Preferential Assignments Ordinance—Absence of Intent to Defeat Creditors — Pressure — "Which has such Effect:" Ross Brothers Limited v. Pearson (N. W.T.), 338, 575.

BANKS AND BANKING.

See Parties, 2.

BAWDY HOUSE.

See Contract, 4—Criminal Law, 1—Executors and Administrators, 2.

BILLIARD ROOMS.

See Municipal Corporations, 2—Summary Conviction.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Promissory Note—Fraud or Duress —Bills of Exchange Act, sec. 29—Holder in Due Course — Value—Good Faith — Notice of Defect—Note Payable to Bearer—Restrictive Indorsement: Gibson v. Coates (Man.), 556.

2. Promissory Note — Holder in Due Course — Defect in Title—Onus—Indorsement after Maturity—Equities—Payment on Account: Smith v. Galbraith (Man.), 227.

3. Promissory Notes — Consideration —Sale of Animals—Defective Title of Vendor — Approbation after Discovery of Defect: Primeau v. Mouchelin, Primeau v. Pantel (Man.), 434.

4. Promissory Notes—Signatures Procured by Representation that Another would be Obtained—Failure to Obtain — Absence of Repudiation — Consideration — Indorsee —Holder in Due Course for Value without Notice: First National Bank of Minneapolis v. McLean (Man.), 538.

See Collateral Security — Limitation of Actions, 1, 2—Parties, 4—Pleading, 1.

BILLS OF LADING.

See Railway, 1.

BILLS OF SALE AND CHATTEL MORTGAGES.

See Bankruptcy and Insolvency—Collateral Security—Sheriff.

BRIDGE.

See Way.

BRIEF.

See Costs, 8.

BUILDING CONTRACT.

See Contract, 1, 2—Mechanics' Liens.


Digitized by Google

BUILDINGS.

See Municipal Corporations, 3.

BY-LAWS.

See Municpal Corporations — Summary Conviction.

CARRIERS.

See Contract, 3—Railway, 1, 2.

CAVEAT.

See Real Property Act.

CHARGE ON LAND.

See Estoppel—Lis Pendens — Trusts and Trustees.

CHARGING ORDER.

See Solicitor, 1.

CHATTEL MORTGAGE.

See Bankruptcy and Insolvency—Collateral Security—Sheriff.

CHOSE IN ACTION.

Assignment of—Action by Assignee—Claim for Damages by Defendant—Set-off — Counterclaim — Consideration — Notice: Lillie v. Thomas (N.W.T.), 467.

CHURCH.

Dispute as to Ownership of Land and Building — Rival Claimants—Difference in Tenets — Question of Fact—Onus—Appeal: Zacklynski v. Kerchinski (N.W.T.), 32.

See Criminal Law, 4.

CITY CHARTER.

See Statutes.

CLOSING STREET.

See Municipal Corporations, 1.

COLLATERAL SECURITY.

Enforcement—Bar—Promissory Notes for Price of Machinery—Retaking and Selling Machinery under Conditional Sale Contract — Chattel Mortgages Collateral to Notes—Effect on: Massey-Harris Co. v. Lowe (N.W.T.), 213.

COMMISSION.

See Evidence, 3, 4 — Principal and Agent, 1.

COMMISSIONER.

See Affidavit.

COMPANY.

Sale of Goods for Use of Company about to be Formed—Action for Price—Goods Charged to Manager of Company Personally—Liability: Vulcan Iron Works v. Leary (Man.), 453.

See Constitutional Law, 1—Discovery, 1, 2—Mines and Minerals, 1—Parties, 1—Principal and Agent, 3.

CONDITIONAL SALE.

See Collateral Security — Estoppel—Sale of Goods, 3.

CONSPIRACY.

Combination — Injury to Business—Restraint of Trade—Rights of Individuals — Criminal Code, sec. 520: Gibbins v. Metcalfe (Man.), 139.

CONSTITUTIONAL LAW.

1. Foreign Companies Ordinance, 1903, N.W.T.—Intra Vires—Manufacturing Company Incorporated under Dominion Companies Act—Application of Territorial Ordinance — Carrying on Business in Territories without Registration—Conviction: Rex v. Massey-Harris Co. (N.W.T.), 45.

2. Foreshore of Vancouver Harbour—Occupation by Canadian Pacific Railway — Powers of Dominion

Digitized by Google

Parliament — Terms of Union — Public Rights of Way· Attorney-General for British Columbia v. Canadian Pacific R. W. Co. (B.C.), 299.

3. Prairie Fire Ordinance—Powers of Territorial Legislature — Intra Vires—Canadian Pacific Railway—Conviction—Evidence as to Cause of Fire: Rex v. Canadian Pacific R. W. Co. (N.W.T.), 89.

See Municipal Corporations, 2.

CONTEMPT OF COURT.

1. Disobedience of Order for Interim Alimony — Order for Payment of Money: Galley v. Galley (N.W.T.), 155.

2. Inquiry before Magistrate—Refusal of Witness to Answer Question—Relevancy — Erasing Name from Voters' List—Dominion Election—Returning Officer—Question as to Source of Receipt of List: Re Ayotte (Man.), 79.

CONTRACT.

1. Building Contract—Action for Balance of Contract Price—Counterclaim — Omission to do Part of Work — Failure to Complete in Workmanlike Manner—Questions of Fact—Set-off of Costs—Scale of Costs: Dodds v. Morrison (N.W.T.), 164.

2. Building Contract — Delay Caused by other Contractors—Failure to Notify Architect and Apply for Extension of Time — Penalty for Delay — Provisions of Contract: Grey v. Stephens (Man.), 450.

3. Carriage of Goods—Freight Rates — Dispute — Correspondence — Construction—Pacific Cold Storage Co. v. Troughton (Y.T.), 529.

4. Illegality and Immorality—Bawdy House—Part Performance — Locus Poenitentiæ — Rescission before Execution: Perkins v. Jones (N.W.T.), 41.

5. Logging—Moneys Advanced—Scaling Logs—Conditions of Contract Lequime v. Brown (B.C.), 193.

6. Sale of Goods—Failure to Deliver —Counterclaim for Refusal to Accept—Damages: Kennedy v. Joyce (N.W.T.), 197.

7. Sale of Goods—Refusal to Complete Delivery — Breach — Damages—Measure of: Johnston v. Hurb (Man.), 565.

8. Sale of Goods—Time for Delivery —Novation—Discharge of Old Contract—Statute of Frauds—Breach of Contract—Damages—Return of Goods Given in Exchange: Clement v. Faircloth Co. (Man.), 524.

9. Sale of Goods—Time of Shipment—Fulfilment of Provision—Time of Loading on Cars — Receipt of Shipping Bill—Place of Weighing —Departure from Contract — Mistake — Costs: Perry v. Manitoba Milling Co. (Man.), 541.

10. Sale of Goods on Credit—Representation by Purchaser—To whom Credit Given—Contradictory Evidence—Liquor License Ordinance —Licensee—Restaurant Business—Estoppel: North American Transportation and Trading Co. v. Olsen (Y.T.), 518.

See Crown Lands—Detinue, 2—Limitation of Actions, 3—Master and Servant, 1, 2, 5—Mechanics' Liens —Mines and Minerals, 1—Parties, 1—Principal and Agent—Railway, 2—Sale of Goods — Specific Performance—Vendor and Purchaser.

CONTRIBUTORY NEGLIGENCE.

See Bailment — Innkeeper — Master and Servant, 3—Street Railways.

CONVERSION.

See Sale of Goods, 8 — Trespass to Land.

CONVICTION.

See Constitutional Law, 1, 3—Criminal Law—Justice of the Peace—Liquor License Ordinance—Municipal Corporations, 3 — Summary Conviction.

Digitized by Google

## CORPORATION.

See Company — Municipal Corporations.

## COSTS.

1. Appeal to Full Court — Costs not Specifically Awarded — Statutory Provision: Kickbush v. Cawley (B.C,), 18.

2. Increased Counsel Fee — Time for Applying: Cooper v. Yorkshire Guarantee Co. (B.C.), 337.

3. Partnership Action—Dissolution—Deduction from Assets—Indebtedness of Plaintiff to Defendants—Set-off: Bockfinger v. Murray (Y.T.), 260.

4. Security for — Action on Foreign Judgment — Merits of Defence: Joshua Handy Machine Works v. Pace (N.W.T.), 156.

5. Security for—Amount — Interlocutory Appeal to Full Court—Consolidation of Appeals: Spencer v. Drysdale (B.C.), 6.

6. Security for—Non-compliance with Order — Neglect to Indorse Order with Notice under Rule 329—Notice not Applicable: Thomas v. Clark (Y.T.), 512.

7. Taxation—Witness Fees—Counsel Fees—Delay at Trial: John Abell Co. v. Long, 24.

8. Taxation—Motion to Dismiss Action for Want of Prosecution—Interlocutory Application—Affidavit—Information and Brief — Brief and Instructions for Brief—Counsel Fee: Gibson v. Drennan (N.W.T.), 577.

See Appeal to Supreme Court of Canada—Appeal to Yukon Territorial Court, 1—Assessment and Taxes, 2—Contract, 1, 9—Detinue, 2—Discovery, 2, 4—Interpleader—Judgment, 6—Limitation of Actions,2—Lis Pendens—Master and Servant, 3—Mechanics' Liens, 1—Municipal Corporations, 3—Sale of Goods, 5, 8—Set-off — Sheriff — Solicitor—Trusts and Trustees—Vendor and Purchaser, 2.

## COUNSEL FEES.

See Costs, 2, 7, 8.

## COUNTERCLAIM.

See Chose in Action—Contract, 1, 6—Detinue, 2—Judgment, 2—Landlord and Tenant, 4—Pleading, 2—Sale of Goods, 7.

## COUNTY COURTS.

See Equitable Execution—Mines and Minerals, 4.

## COVENANT.

Restraint of Trade—Breach — Engaging in Business — Carrying on Business — Evidence — Onus — Business Carried on in Name of Another: Kerr v. Bowden (N.W.T.), 28.

See Landlord and Tenant, 2, 3—Limitation of Actions, 1, 3.

## CRIMINAL LAW.

1. Keeping Bawdy House—Conviction—Evidence — Place of Resort for Prostitutes — Criminal Code, sec. 195: Rex v. Osberg (Man.), 121.

2. Keeping Common Gaming House—Conviction — Evidence to Sustain—Keeping for Gain — Resort of Persons to House — Game of Chance: Rex v. Mah Kee (N.W.T.), 37.

3. Murder — Absence of Direct Evidence—Corpus Delicti — Presumption of Death — Crown Counsel—Right of Reply—Comment on Failure of Prisoner to Testify—Crown Case Reserved—New Trial: Rex v. Charles King (N.W.T.), 348, 576.

4. Obstructing Religious Services—Criminal Code, sec. 171 — Indictment—Sufficiency — "Unlawfully"—Church Owned by a Religious Society—Intrusion by Members of another Society — Trespass—Justification—Jury — Evidence: Rex v. Wasyl Kapij (Man.), 130.

Digitized by Google

5. Speedy Trial—Election—Nature of Offence—Warrant of Commitment —Depositions—Assault or Attempt to Commit Rape: Rex v. Preston (B.C.), 17.

See Conspiracy—Justice of the Peace —Liquor License Ordinance—Malicious Prosecution — Municipal Corporations, 3.

CROPS.

See Ejectment — Execution, 6—Husband and Wife, 3 — Vendor and Purchaser, 1.

CROWN.

See Assessment and Taxes, 2—Particulars, 2—Real Property Act.

CROWN COUNSEL.

See Criminal Law, 3.

CROWN LANDS.

Pre-emption — Laches — Abandonment—Petition of Right—Contract of Crown with Pre-emptor: Cartwright v. The King (B.C.), 103.

DAMAGES.

See Chose in Action—Contract, 6, 7, 8 — Indemnity — Interpleader — Jury Notice — Limitation of Actions, 3—Malicious Prosecution—Mines and Minerals, 1—Municipal Corporations, 6—Nuisance—Railway, 2, 3—Sale of Goods, 4, 5, 7—Set-off—Water and Watercourses, 1.

DECLARATORY JUDGMENT.

See Lis Pendens.

DEDICATION.

See Municipal Corporations, 1

DEED.

Rectification — Mistake — Grant of Right of Way with Exclusive Possession—Compensation: Tarry v. West Kootenay Power and Light Co. (B.C.), 186.

DEFAMATION.

Slander — Words Capable of Defamatory Meaning — Question for Jury —Absence of Allegation of Special Damage: Cameron v. Overend (Man.), 545.

DEPOSIT.

See Parliamentary Elections, 2.

DEPOSITIONS.

See Evidence, 2.

DEPUTY RETURNING OFFICER.

See Parliamentary Elections, 2.

DETINUE.

1. Animal — Evidence of Identity—Misdescription — Amendment: Pearce v. Hart (N.W.T.), 476.

2. Contract for Keep of Animals—Dispute as to Terms—Detention—Tender before Action — Counterclaim—Costs: McKinnon v. Minatty (Y.T.), 272.

DEVISE.

See Will.

DISCOVERY.

1. Production of Documents—Affidavit —Officer of Company — Cross-examination — Claim of Privilege—Contemplated Litigation—Duty of Officer to Obtain Information—Disclosing Names of Witnesses: Savage v. Canadian Pacific R. W. Co. (Man.), 441.

2. Production of Documents—English Practice — Payment of Costs of Discovery—Incorporated Company —Selection of Officer to Make Affidavit on Production: Canadian Bank of Commerce v. Carbonneau (Y.T.), 399.

3. Production of Documents — Mortgage — Estoppel — Fraud — Discovery Limited as to Date by Affidavit on Production — Account—Preliminary Issue—Better Affidavit: Canadian Bank of Commerce v. McDonald (Y.T.), 506.

Digitized by Google

4. Security for Costs of — English Rules—Special Provisions of Yukon Rules — Practice: Canadian Bank of Commerce v. Carbonneau (Y.T.), 262.

See Particulars.

DISCRIMINATION.

See Municipal Corporations, 2.

DISMISSAL OF ACTION.

See Costs, 8—Judgment, 1.

DISMISSAL OF SERVANT.

See Master and Servant, 1, 2.

DITCHES.

See Mines and Minerals, 2.

DOMINION LANDS ACT.

See Vendor and Purchaser, 4.

DURESS.

See Bills of Exchange and Promissory Notes, 1.

EASEMENT.

See Water and Watercourses, 1.

EJECTMENT.

Right of Action by Owner of Reversion—Rights of Lessee—Entry by Lessee — Exclusive Right — Oral Lease — Agreement as to Crops: Penner v. Winkler (Man.), 403.

ELECTION.

See Criminal Law, 5 — Master and Servant, 1.

ELECTIONS.

See Municipal Elections — Parliamentary Elections.

EMPLOYERS' LIABILITY INSURANCE.

See Master and Servant, 3.

ENUMERATORS.

See Parliamentary Elections, 2.

EQUITABLE EXECUTION.

Judgment Debtor's Interest in Land—County Court Judgment—Sale under Registered Certificate—Cancellation of Agreement for Sale—Consideration — Crop-payments—Assignment—County Courts Act: McGregor v. Withers (Man.), 429.

See Receiver, 1.

EQUITABLE JURISDICTION.

See Arbitration and Award, 1.

ESTOPPEL.

Charge on Land—Lien Memorandum—Representation as to Ownership—Subsequent Conduct—Extension of Time for Payment—Conditional Sale of Goods—Lien—Acceptance: John Abell Co. v. Hornby (Man.), 3.

See Contract, 10 — Discovery, 3—Master and Servant, 1—Mines and Minerals, 3.

EVIDENCE.

1. Cross-examination on Affidavit—Interlocutory Motion — Original Document — Production by Witness: Wilson v. Rannie (Y.T.), 397.

2. Depositions in Former Action—Admissibility — Lack of Opportunity for Cross-examination: Graham v. Frank (Y.T.), 510.

3. Foreign Commission—Application for—Affidavit in Support—Purpose of Evidence Sought: Spencer v. Drysdale (B.C.), 7.

4. Foreign Commission—Examination of Defendant and Witness abroad—Failure to Make Case on Application: Stearns v. Kimmell (Y.T.), 390.

Digitized by Google

See Administration — Affidavit — Covenant — Criminal Law — Discovery — Executors and Administrators, 2—Judgment, 5—Landlord and Tenant, 1, 2—Limitation of Actions, 3—Master and Servant, 3 — Parliamentary Elections, 2—Particulars — Railway, 1—Sale of Goods, 7—Trusts and Trustees.

EXECUTION.

1. Exemption from Seizure—Option of Debtor: Dickinson v. Robertson (B.C.), 142.

2. Fi. Fa.—Seizure of Book Debts — Attachment of Debts: Jobin-Marrin Co. v. Betts (N.W.T.), 369.

3. Homestead Exemption — Mortgage —Sale—Lien on Proceeds—Land Titles Act—Incumbrances: Bocz v. Spiller (N.W.T.), 366.

4. Irregularity — Judgment — Amendment—Præcipe — Signature—Motion—Waiver: Carbonneau v. Latourneau (Y.T.), 273.

5. Proceeds of Sale Stolen from Sheriff's Bailiff—Satisfaction of Judgment — Advertisement of Sale—Bailiff Advertising as Auctioneer for Executors and Execution Debtor: Massey-Harris Co. v. Mollond (Man.), 424.

6. Seizure of Crops on Land Transferred by Execution Debtor—Labour and Means of Transferee—Ownership of Crops—Interpleader: Massey-Harris Co. v. Moore (N.W.T.), 215.

See Equitable Execution — Solicitor, 2—Stolen Goods.

EXECUTORS AND ADMINISTRATORS.

1. Accounts of Executor — Assets—Sale of Property—Disbursements —Auctioneer's Fees—Vouchers—Declaration of Indebtedness—Security — Advertisement for Creditors: Re Lilly (N.W.T.), 117.

2. Chattels Found on Person of Intestate—Action to Recover Possession—Proof of Ownership—Corroboration—Declaration of Trust as to Land—Resulting Trust—Illegal and Immoral Purpose — Bawdy House: Bakewell v. Mackenzie (N.W.T.), 68.

See Administration — Execution, 5—Specific Performance, 2.

EXEMPTION.

See Execution, 1, 3.

EXPROPRIATION.

See Municipal Corporations, 6.

EXTRA-JUDICIAL SEIZURE.

See Sale of Goods, 3.

FENCE VIEWERS.

See Water and Watercourses, 2.

FENCES.

See Railway, 3, 4.

FIRE.

See Constitutional Law, 3.

FOREIGN COMMISSION.

See Evidence, 3, 4.

FOREIGN COMPANIES ORDINANCE.

See Constitutional Law, 1.

FOREIGN JUDGMENT.

See Costs, 4—Judgment, 4, 5—Limitation of Actions, 1.

FOREIGN LANDS.

See Limitation of Actions, 1.

FOREIGN LAW.

See Limitation of Actions, 1.

FORESHORE.

See Constitutional Law, 2.

Digitized by Google

FORFEITURE.

See Landlord and Tenant, 2, 3—Vendor and Purchaser, 1 2.

FRAUD.

See Bills of Exchange and Promissory Notes, 1—Discovery, 3—Judgment, 1—Trusts and Trustees.

FRAUDULENT CONVEYANCE.

See Lis Pendens.

FUNERAL EXPENSES.

See Husband and Wife, 2.

GARNISHMENT.

See Attachment of Debts.

GOLD COMMISSIONER.

See Mines and Minerals, 3, 4.

HARBOUR.

See Constitutional Law, 2.

HOMESTEAD.

See Assessment and Taxes, 1, 2—Execution, 3.

HUSBAND AND WIFE.

1. Alimony—Interim Order—Time for Applying—Pleadings — Time for Commencement of Allowance—Disbursements—De Facto Marriage —Merits — Discretion — Appeal: McArthur v. McArthur (Man.), 1.

2. Estate of Deceased Wife—Liability for Funeral Expenses — Married Woman's Property Acts—Duty of Husband — Indemnity: Re Sea (B.C.), 460.

3. Land Acquired by Wife—Separate Property—Seizure of Crops by Execution Creditor of Husband—Work Done by Husband on Land: Harvey v. Silzer (N.W.T.), 360.

See Contempt of Court, 1 — Specific Performance, 1.

ILLEGALITY.

See Contract, 4—Executors and Administrators, 2—Pleading, 1.

IMMORALITY.

See Contract, 4—Executors and Administrators, 2.

IMPROVEMENTS.

See Sale of Goods, 3.

INDEMNITY.

Right to—Claim for Damages—Third Party Notice—Appearance—Objection on Return of Summons for Directions: McFee v. Young (N.W.T.), 383.

See Husband and Wife, 2 — Interpleader.

INDEPENDENT CONTRACTOR.

See Master and Servant, 5.

INFANT.

See Trusts and Trustees.

INJUNCTION.

See Mines and Minerals, 1—Municipal Corporations, 6 — Nuisance—Telephone Company — Water and Watercourses, 1.

INNKEEPER.

Guest's Luggage Lost or Stolen—Safe Keeping — Contributory Negligence: Barrie v. Wright (Man.), 412.

INSOLVENCY.

See Bankruptcy and Insolvency.

INSURANCE.

See Master and Servant, 3.

INTEREST.

See Judgment, 7—Parties, 2—Vendor and Purchaser, 2.


Digitized by Google

INTERPLEADER.

Stakeholder—Demand and Refusal of Indemnity — Replevin — Nominal Damages — Costs: McCallum v. Williams (N.W.T.), 257.

See Execution, 2—Sheriff — Stolen Goods.

INTOXICATING LIQUORS.

See Liquor License Ordinance—Municipal Corporations, 4, 5.

JOINDER OF CAUSES OF ACTION.

See Arbitration and Award, 1—Trespass to Land.

JUDGMENT.

1. Action to Set aside — Pleading—Fraud—Service of Writ of Summons—Satisfaction of Debt—Relief in Original Action—Summary Dismissal of Action: Richards v. Williams (B.C.), 9.

2. Default Judgment—Motion to Set aside—Defence — Counterclaim—Security for Costs — Summons or Notice of Motion — Affidavit of Merits—Security in Hands of Defendants: Moyie Lumber and Milling Co. v. May (N.W.T.), 152.

3. Default Judgment — Setting aside —Defence on Merits—Discretion of Referee—Appeal: McCaul v. Christie (Man.), 332.

4. Foreign Judgment—Action on—Defences Pleaded in Original Action —King's Bench Act, sec. 38 (1)—Construction of: Hickey v. Legresley (Man.), 546.

5. Foreign Judgment — Action on—Proof of Judgment—Seal of Foreign Court—Certificate of Clerk—Proof of Identity of Plaintiffs: Stephens v. Olsen (N.W.T.), 572.

6. Order for — Powers of Referee—Rescinding Order — Appeal—Setting aside Judgment — Costs: Walker v. Robinson (Man.), 181.

7. Summary Judgment—Admission of Part of Claim—Division of Claim —Interest—Rule 228: Lisle v. De Lion (Y.T.), 274.

See Costs, 4—Execution, 4, 5—Limitation of Actions, 1—Lis Pendens —Master and Servant, 1.

JUDGMENT DEBTOR.

See Equitable Execution—Parties, 2.

JUDICIAL COMMITTEE.

See Appeal to Privy Council.

JURY.

See Criminal Law, 4—Defamation—Master and Servant, 3—Trial.

JURY NOTICE.

Regularity — Action for Damages — Amount under $500 — Statutes—Construction—Application — Repeal: Ledieu v. Roediger (Y.T.), 515.

JUSTICE OF THE PEACE.

1. Conviction—Information Charging more than one Offence — Trial—Jurisdiction — Amendment — Appeal: Rex v. Austin (N.W.T.), 571.

2. Jurisdiction — Summary Trial — Charge of Keeping Common Gaming House — Interpretation of Criminal Code: Re Rex v. Flynn (Y.T.), 388.

See Contempt of Court, 2—Municipal Corporations, 3.

KEEPING BAWDY HOUSE.

See Criminal Law, 1.

KEEPING COMMON GAMING HOUSE.

See Criminal Law, 2—Justice of the Peace, 2.

LACHES.

See Crown Lands—Particulars, 2—Specific Performance, 1.


Digitized by Google

LAND REGISTRY ACT, B.C.

See Lis Pendens.

LAND SCRIP.

See Replevin.

LAND TITLES ACT, N.W.T.

See Execution, 3.

LANDLORD AND TENANT.

1. Action for Rent—Defences — Eviction—Entry by Landlord to Protect Property—Demised Premises Becoming Uninhabitable: Harrod v. Watt (N.W.T.), 216.

2. Eviction—Action for — Defence—Forfeiture for Breach of Covenant —Surrender of Lease—Damages—Discretion of Trial Judge — Appeal: Watson v. Moggey (Man.), 438.

3. Forfeiture of Lease — Breach of Covenant not to Sublet without Leave—Acquiescence — Waiver—Breach of Covenant to Repair: Minuk v. White (Man.), 401.

4. Overholding Tenant — Claim for Double Yearly Value — Counterclaim in Tenant's Action—Lease for One Year Terminable on One Month's Notice: Dundas v. Osmont (N.W.T.), 363.

5. Overholding Tenant — Expiry of Lease—Creation of New Tenancy —Increased Rent — Presumption —Intention of Parties: Winnipeg Land and Mortgage Corporation v Witcher (Man.), 551.

See Ejectment—Nuisance

LEAVE TO APPEAL

See Appeal to Privy Council—Appeal to Yukon Territorial Court.

LEGISLATURE.

See Constitutional Law.

LETTERS OF ADMINISTRATION.

See Administration.

LIBEL.

See Defamation.

LICENSE.

See Water and Watercourses, 1.

LICENSE COMMISSIONERS.

See Municipal Corporations, 4.

LICENSING POWERS.

See Municipal Corporations, 2.

LIEN.

See Assessment and Taxes, 1—Estoppel—Execution, 3 — Limitation of Actions, 2—Mechanics' Liens—Sale of Goods, 3, 4, 6—Set-off—Solicitor, 1.

LIEUTENANT-GOVERNOR IN COUNCIL.

See Municipal Corporations, 1.

LIMITATION OF ACTIONS.

1. Promissory Notes — Covenant in Mortgage—Foreign Lands—Sealed Instrument — Foreign Law—Foreign Judgment—Jurisdiction—Defendant Resident in Territories—Subject of Foreign State—Allegiance—Natural Justice—Purchase by Mortgagee at Judicial Sale: Dakota Lumber Co. v. Rinderknecht (N.W.T.), 481.

2. Promissory Notes—Lien on Land—Right to Redeem—Tender—Sale—Confirmation — Costs: Re Hardaker (N.W.T.), 161.

3. Real Property Limitation Act — Contract for Sale of Land—Covenant for Good Title—Breach—Action for — Damages — Money Charged on Land—Written Contract—Parol Variation—Evidence: Wilson v. Graham (Man.), 278.


Digitized by Google

LINE FENCES AND WATERCOURSES ACT.

See Water and Watercourses, 2.

LIQUOR LICENSE ORDINANCE.

Conviction for Illegal Sale of Liquor —Motion to Quash—Penalty Less than Prescribed—Invalidity—Saving Enactment — Criminal Code, sec. 896—Application of Conditions —Appeal: Rex v. Hostyn (N.W. T.), 113.

See Contract, 10—Municipal Corporations, 4, 5.

LIS PENDENS.

Registration of Certificate—Cloud on Title—Action to Set aside—Pendency after Judgment — Equitable Interest in Land—Land Registry Act, B.C.—Vendor and Purchaser —Vendor's Lien—Charge on Land —Fraudulent Conveyance—Notice —Bona Fide Purchaser for Value - Declaratory Judgment — Costs: Peck v. Sun Life Assurance Co. of Canada (B.C.), 302.

LIVERY STABLE.

See Nuisance.

LOCAL OPTION.

See Municipal Corporations, 5.

LOCATION.

See Replevin.

LORD'S DAY.

See Municipal Corporations, 2.

LOST LUGGAGE.

See Innkeeper.

MALICIOUS PROSECUTION.

Information for Theft — Acquittal— Want of Reasonable and Probable Cause — Malice — Damages: Colwill v. Johnson (N.W.T.), 218.

MANDAMUS.

See Municipal Corporations, 4.

MANITOBA GRAIN ACT.

See Railway, 1.

MARRIAGE.

See Husband and Wife.

MARRIED WOMAN.

See Husband and Wife.

MASTER AND SERVANT.

1. Dismissal of Servant—Election to Treat Contract as Rescinded—Previous Action for Wages — Judgment—Estoppel: Doherty v. Vancouver Gas Co. (B.C.), 252.

2. Dismissal of Servant—Justification: Gourmany v. Manitoba Club (Man.), 175.

3. Injury to Servant—Mines—Explosion—Negligence—Breach of Statutory duty—Jury — Contributory Negligence — Misdirection — Evidence — Insurance by Employers against Risk to Workmen—New Trial—Costs: Davies v. Canadian-American Coal and Coke Co. (N. W.T.), 55, 97.

4. Injury to Servant—Ship — Negligence — Bursting of Capstan—Defect — Notice — Defective System —Superintendent — Competence— Common Law Liability—Aggravation of Injury by Subsequent Conduct—Master of Ship — Scope of Authority — Delay in Transport: Morgan v. British Yukon Co. (B.C.), 294.

5. Wages — Independent Contractor —Logging Contract—Payment to Contractor without Production of Signed Pay Rolls — Mechanics' Lien Act: Young v. West Kootenay Shingle Co. (B.C.), 184.

Digitized by Google

## MECHANICS' LIENS.

1. Action to Enforce — Owner—Contractor—Amount Due—Completion of Building — Acceptance — Occupation—Terms of Contract — Reference — Costs: Black v. Wiebe (Man.), 75.

2. Materials Furnished — Request of Owner — Implication: Fortin v. Pound (B.C.), 333.

See Master and Servant, 5.

## MINES AND MINERALS.

1. Trespass Workings — Abstraction of Ore—Injury to Predecessors in Title—Agreement with New Company — Partnership between Old and New Company—Construction of Agreement—Conversion of Ore —Notice to New Company—Accumulation of Water — Nuisance—Injunction — Nominal Damages: Centre Star Mining Co. v. Rossland-Kootenay Mining Co. (B.C.), 313.

2. Water Grants — Renewal — Ditch —Compensation — Interference: Graves v. McDonald (Y.T.), 325.

3. Water Regulations — Jurisdiction of Gold Commissioner—Res Judicata—Estoppel — Water Rights—Priorities: Anglo-Klondike Mining Co. v. Cook (Y.T.), 322.

4. Water Rights — Jurisdiction of County Court—Placer Mining Act —Concurrent Action — Water Record—Status to Attack — Water Clauses Consolidation Act — Gold Commissioner — Application to—Parties — "Layman" — Form of Record: Brown v. Spruce Creek Power Co. (B.C.), 143.

See Master and Servant, 3 — Water and Watercourses.

## MISCONDUCT.

See Solicitor, 2.

## MISDIRECTION.

See Master and Servant, 3.

## MISREPRESENTATIONS.

See Specific Performance, 2—Vendor and Purchaser, 5.

## MISTAKE.

See Contract, 9 — Deed — Sale of Goods, 7—Vendor and Purchaser, 4.

## MORTGAGE.

See Discovery, 3 — Execution, 3 — Limitation of Actions, 1 — Receiver, 1.

## MUNICIPAL CORPORATIONS.

1. By-law Closing Street—Private Interest—Absence of Public Benefit —Jurisdiction over Street — Expenditure of Public Money—Dedication by Private Plan—Approval by Lieutenant-Governor in Council — Promulgation: Re Knudson and Town of St. Boniface (Man.), 281.

2. By-law Regulating Billiard Rooms —Licensing Powers—Provision as to Times for Closing—Lord's Day Observance—Constitutional Law—Provision as to Screens — Discrimination: Re Fisher and Village of Carman (Man.), 455.

3. By-law Regulating Erection and Repair of Buildings — Powers of Municipality — "Erection" — Municipal Act — Submission of Plans — Validating Statute — Quashing Conviction—Prohibition to Magistrate — Costs: Rex v. Nunn, Re Rogers and Nunn (Man.), 559.

4. By-law Regulating Issue of Liquor Licenses — Validity — Powers of License Commissioners — Wholesale License—Discretion — Mandamus — Practice — Summons or Motion: Re Dundass and Municipality of Chilliwack (B.C.), 94.

5. Local Option By-law — Motion to Quash — Procedure — Non-Compliance with Statute—Substantial Compliance—Petition for By-law —Percentage of Qualified Electors

Digitized by Google

—Inquiry by Council—Minutes of Council—Voters' List — Certificate of Clerk—Summing up of Votes—Adjournment—Time for By-law to Take Effect: Re Caswell and Rural Municipality of South Norfolk (Man.), 327.

6. Public Parks Board of Town—Public Parks Act—Powers— Flooding Lands — Expropriation—Compensation — Injunction — Damages: Smith v. Public Parks Board of Portage La Prairie (Man.), 237.

See Statutes—Summary Conviction —Telephone Company—Way.

MUNICIPAL ELECTIONS.

1. Controverted Election — Summons in Nature of Quo Warranto—Relation — Requirements of—Acceptance and Oath of Office—Term for which Respondent Elected: Rex ex rel. Park v. Street (N.W.T.), 87.

2. Rejection of Ballot Cast for Relator —Concurrence of Relator—Incapacity through Drunkenness: Rex ex rel. Park v. Street (N. W. T.), 202.

MURDER.

See Criminal Law, 3.

NEGLIGENCE.

Unsafe Premises — Invitation — Unguarded Hole in Floor—Absence of Warning — Notice of Danger from Circumstances: Fonseca v. Lake of the Woods Milling Co. (Man.), 553.

See Architect — Bailment — Innkeeper—Master and Servant, 3, 4 —Railway—Street Railways.

NEW TRIAL.

Surprise — Affidavits — Loss of Cattle —Bailment—Cause of Disease not Assigned in Pleading or Preliminary Examination: McLenaghan v. Hood (Man.). 422.

See Criminal Law, 3 — Master and Servant, 3—Trial.

NOTICE.

See Chose in Action—Costs, 6—Lis Pendens—Master and Servant, 4—Mines and Minerals, 1 — Parliamentary Elections, 2 — Sale of Goods, 2 — Trusts and Trustees—Vendor and Purchaser, 1—Way.

NOTICE OF APPEAL.

See Appeal to Yukon Territorial Court.

NOVATION.

See Contract, 8—Sale of Goods, 6.

NUISANCE.

Livery Stable—Neighbouring Dwelling Houses—Business Part of City—Transition Stage—Parties—Action by Owner of Houses—Addition of Tenants as Plaintiffs—Injunction or Damages: McKenzie v. Kayler (Man.), 290.

See Mines and Minerals, 1.

OBSTRUCTING RELIGIOUS SERVICES.

See Criminal Law, 4.

OVERHOLDING TENANTS.

See Landlord and Tenant, 4, 5.

PARLIAMENT.

See Constitutional Law.

PARLIAMENTARY ELECTIONS.

1. Controverted Election Petition—Preliminary Objections—Affidavit of Petitioners—Intituling—Receipt —Clerical Error: Re Qu'Appelle Dominion Election (N.W.T.), 496.

2. Controverted Election Petition—Preliminary Objections—Status of Petitioners — Evidence — Voters' List—Certified Copy—Notice under Canada Evidence Act—Oral Testimony of Petitioners — Notice of Presentation of Petition and of Security — Clerical Error—Copy of Certificate of Registrar—Receipt—

Digitized by Google

Service — Deposit—Bank Notes—Payment of Cost of Publication of Petition—Credit—Affidavit Verifying Petition—Proof that Election Held—Illegal Acts of Enumerators and Deputy Returning Officers: Re Alberta Dominion Election (N.W.T.), 486.

See Contempt of Court, 2.

PART PERFORMANCE.

See Contract, 4—Sale of Goods, 1.

PARTICULARS.

1. Action for Account—Postponement till after Discovery: Canadian Bank of Commerce v. McDonald (Y.T.), 271.

2. Laches — Crown — Defence to Petition of Right: Cartwright v. The King (B.C.), 82.

PARTIES.

1. Action to Enforce Contract and for Breach—Addition of Company as Co-plaintiff—Company not in Existence when Contract Made—Principal of Cestui que Trust—Pleading — Amendment: Cass v. McCutcheon (Man.), 435.

2. Adding New Plaintiff without his Consent—Aiding Original Cause of Action — New Cause of Action—Bona Fide Mistake — Account — Bank—Excessive Interest—Voluntary Payment—Action by Receiver and Judgment Creditors—Addition of Judgment Debtor: Ritchie v. Canadian Bank of Commerce (Y.T.), 499.

3. Addition of Co-plaintiff — New Cause of Action—Rule 26: Hogan v. Bactz, Hogan v. Bactz and Taylor (Y.T.), 393.

4. Application to Add Defendants—Indorsers of Promissory Notes Sued on—Allegation of Payment—Third Party Procedure: Canadian Bank of Commerce v. Butler (Y.T.), 173.

See Mines and Minerals, 4—Nuisance—Trespass to Land.

PARTNERSHIP.

Profits—Dispute as to Shares—Finding of Equality: Graham v. Frank (Y.T.), 510.

See Costs, 3—Mines and Minerals, 1—Vendor and Purchaser, 4.

PENALTY.

See Contract, 2—Liquor License Ordinance.

PETITION.

See Parliamentary Elections.

PETITION OF RIGHT.

See Crown Lands—Particulars, 2.

PLACER MINING ACT.

See Mines and Minerals, 4.

PLANS.

See Municipal Corporations, 1, 3.

PLEADING.

1. Action on Promissory Note — Defence—Illegality — Failure to Set forth Necessary Facts — Striking out—Amendment: Ireland v. Andrew (N.W.T.), 346, 575.

2. Statement of Defence and Counterclaim—Motion to Strike out—Embarrassment — Previous Action—Res Judicata: Barrette v. Canadian Bank of Commerce (Y.T.), 171.

See Arbitration and Award, 1—Judgment, 1, 2—Particulars—Parties, 1.

PRACTICE.

See Account — Affidavit — Appeal to Privy Council—Appeal to Supreme Court of British Columbia—Appeal to Supreme Court of Canada—Appeal to Yukon Territorial Court—Arbitration and Award—

Digitized by Google

Attachment of Debts—Contempt of Court — Costs — Criminal Law, 5 —Discovery—Equitable Execution — Evidence — Execution, 2, 4 — Husband and Wife, 1—Indemnity —Interpleader — Judgment—Jury Notice—Lis Pendens — Municipal Corporations, 4—New Trial—Parliamentary Elections—Particulars —Parties — Pleading — Real Property Act — Set-off — Sheriff — Solicitor — Trial — Trusts and Trustees.

PRAIRIE FIRE ORDINANCE.

See Constitutional Law, 3.

PRE-EMPTION.

See Crown Lands.

PREFERENTIAL ASSIGNMENTS ORDINANCE.

See Bankruptcy and Insolvency.

PRESSURE.

See Bankruptcy and Insolvency.

PRINCIPAL AND AGENT.

1. Agent's Commission on Proposed Sale of Land—Finding Purchaser —Implied Acceptance of Offer—Correspondence — Subsequent Sale to Another—Personal Liability — Property Standing in Name of Another — Jurisdiction — Writ of Summons—Cause of Action—Contract—Place of Performance: Bell v. Rokeby (Man.), 124, 531.

2. Agent's Commission on Sale of Land — Appeal on Question of Fact: Johnson v. Appleton (B.C.), 14.

3. Contract on Behalf of Company not Formed—Personal Liability—Evidence: Gamble v. Spencer (B.C.), 189.

See Attachment of Debts—Parties, 1 —Sale of Goods, 2—Vendor and Purchaser, 3, 5.



PRIVILEGE.

See Discovery, 1.

PRIVY COUNCIL.

See Appeal to Privy Council.

PRODUCTION OF DOCUMENTS.

See Discovery—Evidence, 1.

PROHIBITION.

See Municipal Corporations, 3.

PROMISSORY NOTES.

See Bills of Exchange and Promissory Notes — Limitation of Actions, 1, 2—Parties, 4—Pleading, 1.

PROMULGATION.

See Municipal Corporations, 1.

PUBLIC ADMINISTRATOR.

See Administration.

PUBLIC PARKS ACT.

See Municipal Corporations, 6.

QUO WARRANTO.

See Municipal Elections.

RAILWAY.

1. Carriage of Goods — Liability for Deficiency in Grain — Weight or Measurement — Negligence—Carriers or Warehousemen—Rights of Consignor — Bill of Lading — Indorsement to Consignee — Manitoba Grain Act — Certificate of Weighmaster — Evidence — Rebuttal — Weights and Measures Act: Ferris v. Canadian Northern R. W. Co. (Man.), 177.

2. Carriage of Passenger's Luggage—Destruction — Contract or Tort—Carriage of Chinamen—Joint Contract—Action by one—Damages—Personal Effects and Household Goods: Chan Dy Chea v. Alberta Railway and Irrigation Co. (N.W.T.), 371.

Digitized by Google

3. Cattle on Track—Destruction of, by Train — Negligence of Engine-driver — Evidence — Trespass — Fences — Damages: Eggleston v. Canadian Pacific R. W. Co., Duggan v. Canadian Pacific R. W. Co. (N.W.T.), 356, 576.

4. Fences—Cattle—Railway Act, sec. 190—Construction: Dreger v. Canadian Northern R. W. Co. (Man.), 126.

See Constitutional Law, 2, 3—Street Railways.

RAPE.

See Criminal Law, 5.

REAL PROPERTY ACT (MAN.)

Application for Certificate of Title—Caveat by Purchaser at Tax Sale—Subsequent Acquisition of Title from Grantee of Crown — Second Caveat while First in Force — Leave to File—Necessity for Order—Statute, Construction of—Postponement of Trial of Issues under First Caveat: Alloway v. Rural Municipality of St. Andrews (Man.), 407.

REAL PROPERTY LIMITATION ACT.

See Limitation of Actions, 3.

RECEIVER.

1. Equitable Execution — Rents of Mortgaged Lands: Imperial Bank of Canada v. Twyford (N.W.T.), 157.

2. Management of Hotel — Liability for Loss—Wilful Default: Plisson v. Diemert (N.W.T.), 359.

See Parties, 2.

RECOVERY OF POSSESSION.

See Ejectment.

RECTIFICATION.

See Deed.

REDEMPTION.

See Trusts and Trustees.

REFERENCE.

See Mechanics' Liens, 1.

REGISTRY LAWS.

See Equitable Execution—Lis Pendens—Real Property Act (Man.).

RELATOR.

See Municipal Elections.

RELIGIOUS SOCIETY.

See Church—Criminal Law, 4.

REPLEVIN.

Land Scrip — Right to Possession of Document — Assignment — Invalidity of, as Transfer of Right to Locate Land: Wright v. Battley (Man.), 563.

See Interpleader.

REPLY.

See Criminal Law, 3.

RES JUDICATA.

See Mines and Minerals, 3—Pleading 2.

RESCISSION.

See Contract, 4 — Vendor and Purchaser, 2.

RESTRAINT OF TRADE.

See Conspiracy—Covenant.

RETURNING OFFICER.

See Contempt of Court .2.

SALE OF GOODS.

1. Action for Price — Collateral Oral Agreement—Condition Precedent—Waiver—Acceptance—Part Performance — Consideration — Warranty—Failure to Return Goods:

Digitized by Google

New Hamburg Manufacturing Co. v. Klotz (N.W.T.), 471.

2. Action for Price—Warranty — Defect in Article—Contract — Conditions as to Return — Compliance with—Authority of Agent of Vendor—Waiver — Notice: John Abell Co. v. Long (N.W.T.), 24.

3. Conditional Sale — Lien—Enforcement — Extra-judicial Seizure — Fees — Amount Due — Tender—Extent of Lien—Moneys Expended in Improving Property: Pease v. Johnston (N.W.T.), 208.

4. Contract — Breach — Failure to Give Lien Notes for Price—Acceptance of Goods — Measure of Damages — Lien — Relief not Claimed: Krienke v. Mohr (N.W.T.), 254.

5. Contract — Breach — Refusal to Accept — Damages—Costs: Watts v. Hehsdoerfer (No. 2) (N.W.T.), 110.

6. Contract — Payment — Security—Lien—Oral Contract—Novation—Consideration—Property Passing: Watts v. Hehsdoerfer (No. 1) (N.W.T.), 105.

7. Contract—Payment of Price—Mistake—Recovery back — Counterclaim — Delay — Damages—Evidence: Scott v. Tasker (N.W.T.), 199.

8. Delivery — Change of Possession—Animals — Visible and Public Change — Conversion—Dispute as to Ownership — Costs—Scale of—Set-off: McNichol v. Brucks (N.W.T.), 478.

See Attachment of Debts—Bills of Exchange and Promissory Notes, 3—Collateral Security — Company —Contract, 6-10—Estoppel.

SALE OF LAND.

See Limitation of Actions, 3—Principal and Agent, 1, 2—Specific Performance—Vendor and Purchaser.

SCHOOLS.

See Assessment and Taxes, 1, 3.

SEAL.

See Limitation of Actions, 1.

SECURITY FOR COSTS.

See Appeal to Supreme Court of Canada—Appeal to Yukon Territorial Court—Costs, 4, 5, 6—Discovery, 2, 4—Judgment, 2.

SEPARATE ESTATE.

See Husband and Wife, 3.

SERVICE OF PAPERS.

See Judgment, 1.

SET-OFF.

Costs — Damages — Different Actions in Same Court—Discretion — Solicitor's Lien—Assignment to Solicitor: Hogan v. Baatz, Hogan v. Baatz and Taylor (Y.T.), 513.

See Chose in Action—Contract, 1—Costs, 3—Sale of Goods, 8.

SHERIFF.

Interpleader — Seizure of Goods — Claim of Third Party—Chattel Mortgages — Rent — Withdrawal —Costs—Issues: McNaughton Co. v. Hamel (N.W.T.), 169.

See Execution, 5.

SHIP.

See Master and Servant, 4.

SLANDER.

See Defamation.

SOLICITOR.

1. Lien on Fund in Court—Charging Order — Priority over Garnishing Orders—Costs—Taxation: Murray v. Royal Ins. Co. (B.C.), 8.

Digitized by Google

2. Misconduct — Defeating Execution —Accepting Transfer of Property of Client after Verdict—Summary Order — Restoration of Property: Centre Star Mining Co. v. Rossland Miners' Union No. 38 (B.C.), 244.

See Affidavit — Appeal to Supreme Court of Canada—Appeal to Yukon Territorial Court — Set-off — Trusts and Trustees—Way.

SPECIAL JURY.

See Trial.

SPECIFIC PERFORMANCE.

1. Contract to Convey Land—Consideration—Satisfaction of Indebtedness to Plaintiff's Husband—Statute of Frauds—Correspondence—Offer to Convey—Failure to Comply with Terms — Contract with Husband—Laches — Concealment of Facts: Osment v. Blount (N.W.T.), 497.

2. Sale of Land by one of three Executors without Authority — Personal Liability of Executor for Misrepresentation: Maneer v. Sanford (Man.), 128.

See Vendor and Purchaser.

SPEEDY TRIAL.

See Criminal Law, 5.

STAKEHOLDER.

See Interpleader.

STATED ACCOUNT.

See Account.

STATUTE OF FRAUDS.

See Contract, 8 — Specific Performance, 1—Vendor and Purchaser, 3, 4, 5.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

Construction — Repeal — City Charter — Revocation — Change in Governing Body — Preamble of Statute—Inconsistency with Enacting Parts: Rex v. Pickering (Y.T.), 521.

See Jury Notice—Municipal Corporations, 3—Real Property Act—Telephone Company.

STAY OF PROCEEDINGS.

See Appeal to Supreme Court of Canada.

STOLEN GOODS.

Exchange — Owner Following Proceeds—Execution Creditor — Interpleader: Howe v. Schroeder (Y.T.), 174.

STOLEN LUGGAGE.

See Innkeeper.

STOLEN MONEY.

See Execution, 5.

STREETS.

See Telephone Company—Way.

STREET RAILWAYS.

Injury to Passenger Alighting from Car—Negligence — Injury by Car on Parallel Line — Invitation to Alight—Contributory Negligence: Bell v. Winnipeg Electric Street R. W. Co. (Man.), 405.

SUCCESSION DUTY.

See Will.

SUMMARY CONVICTION.

Municipal By-law — Offence against—Defects on Face of Conviction—Keeping Billiard Room Open in Prohibited Hours — Uncertainty: Village of Carman v. Fisher (Man.), 276.

Digitized by Google

See Constitutional Law — Criminal Law—Liquor License Ordinance—Municipal Corporations, 3.

SUMMARY JUDGMENT.

See Judgment, 7.

SUMMARY TRIAL.

See Justice of the Peace, 2.

SUNDAY.

See Municipal Corporations, 2.

SUPREME COURT OF BRITISH COLUMBIA.

See Appeal to Supreme Court of British Columbia.

SUPREME COURT OF CANADA.

See Appeal to Supreme Court of Canada.

SURPRISE.

See New Trial.

SURRENDER.

See Landlord and Tenant, 2.

TAX SALE.

See Assessment and Taxes, 2, 3—Real Property Act.

TAXATION.

See Costs, 7, 8—Solicitor, 1.

TAXES.

See Assessment and Taxes.

TELEPHONE COMPANY.

Rights over Streets of City—Control of Municipal Corporation—Underground Wires — Injunction—Declaration of Right — Construction of Statutes: City of Vancouver v. British Columbia Telephone Co. (B.C.), 461.

TENDER.

See Detinue, 2 — Limitation of Actions, 2—Sale of Goods, 3—Vendor and Purchaser, 5.

THEFT.

See Malicious Prosecution.

THIRD PARTIES.

See Indemnity—Parties, 4.

TIMBER.

See Trespass to Land.

TIME.

See Appeal to Yukon Territorial Court—Arbitration and Award, 1—Assessment and Taxes, 3—Contract, 2, 8, 9—Costs, 2—Estoppel—Husband and Wife, 1—Municipal Corporations, 2, 5 — Vendor and Purchaser, 1, 2—Way.

TORT.

See Railway, 2.

TRADE COMBINATION.

See Conspiracy.

TRESPASS TO LAND.

Timber — Conversion — Joinder of Defendants and Causes of Action—Purchasers from Trespassers: Rogers v. Frechette (B.C.), 190.

See Criminal Law, 4 — Mines and Minerals, 1—Railway, 3.

TRIAL.

Special Jury—Order for not Appealed against — Application of, to New Trial Ordered by Court — Provisional Order — Rule 653—Appeal: Alaska Packers' Association v. Spencer (B.C.), 103, 188, 567.

See Costs, 7—Criminal Law—Justice of the Peace — Jury Notice—New Trial—Real Property Act.

Digitized by Google

TRUSTS AND TRUSTEES.

Conveyance of Land to Trustee for Infant — Fraud of Trustee—Conveyance to Creditor as Security—Breach of Trust—Written Declaration of Trust — Oral Evidence to Vary—Notice—Knowledge of Solicitor — Suppression of Facts — Equities between Innocent Parties —Legal Estate — Charge on Land —Redemption—Costs: Macarthur v. Hastings (Man.), 285.

See Executors and Administrators, 2 —Parties, 1.

VENDOR AND PURCHASER.

1. Contract for Sale of Land — Construction — Payment of Purchase Money by Instalments — Default —Failure of Crop—Cancellation—Notice — Time—Action — Forfeiture: McAuley v. Dick (N.W.T), 381.

2. Contract for Sale of Land — Default in Payment of Purchase Money—Rescission of Contract — Delay — Time — Interest — Execution of Conveyance—Conditional Execution — Forfeiture — Costs: Pierson v. Canada Permanent and Western Canada Mortgage Corporation (B.C.), 99.

3. Contract for Sale of Land—Specific Performance—Authority of Agent of Vendor — Scope of—Statute of Frauds—Authority to Sign Name of Vendor: Gilmour v. Simon (Man.), 417.

4. Contract for Sale of Land—Specific Performance—Partnership Land—Authority of one Partner to Sell—Statute of Frauds—Description of Land—Mutual Mistake—Dominion Lands Act—Interest in Homestead —Want of Mutuality: Grierson v Johnston (N.W.T.), 83.

5. Contract for Sale of Land — Vendor's Action for Specific Performance—Statute of Frauds — Letters —Unsigned Agreement—Authority of Agent — Misrepresentations of Vendor—Tender of Conveyance—Waiver — Amendment: McIlvride v. Mills (Man.), 229.

See Equitable Execution—Limitation of Actions, 3 — Lis Pendens — Principal and Agent, 1, 2—Specific Performance.

VOTERS' LISTS.

See Contempt of Court, 2—Municipal Corporations, 5 — Parliamentary Elections, 2.

WAGES.

See Master and Servant, 1, 5.

WAIVER.

See Execution, 4 — Landlord and Tenant, 3 — Sale of Goods, 1, 2—Vendor and Purchaser, 5.

WAREHOUSEMEN.

See Railway, 1.

WARRANT OF COMMITMENT.

See Criminal Law, 5.

WARRANTY.

See Sale of Goods, 1, 2.

WATER AND WATERCOURSES.

1. Ditch — Mineral Claims — Right to Flow of Water — Easement or License — Acquiescence — Diversion of Water—Injunction — Damages: Racine v. McGinnity (Y.T.), 265.

2. Line Fences and Watercourses Act —Award of Fence Viewers — Appeal — "Adjoining" Lands: Re Bowker and Richards (B.C.), 194.

See Mines and Minerals.

WATER CLAUSES CONSOLIDATION ACT.

See Mines and Minerals, 4.

WAY.

Non-repair—Municipal Corporation—Liability for Death Arising from


Digitized by Google

Defective Approach to Bridge—Notice of Claim — Time — Form —Signature by Solicitor: Curle v. City of Brandon (Man.), 176.

See Constitutional Law, 2 — Deed—Municipal Corporations, 1—Telephone Company.

WEIGHTS AND MEASURES.

See Railway, 1.

WILL.

Construction—Direction to Pay Testamentary Expenses—Devise—Succession Duty—Charge against Devisee—Municipal Taxes — Provincial Government Taxes — Residuary Estate—Charge: Re Watkins (B.C.), 457.

WITNESS FEES.

See Costs, 7.

WITNESSES.

See Contempt of Court, 2 —Discovery, 1—Evidence.

WORDS.

"Adjoining"—See Water and Watercourses, 2.
"Erection"—See Municipal Corporations, 3.
"Layman" — See Mines and Minerals, 4.
"Unlawfully"—See Criminal Law, 4.
"Which has such Effect"—See Bankruptcy and Insolvency.

WORK AND LABOUR.

See Contract, 1, 2, 5 — Husband and Wife, 3.

WORKMEN'S COMPENSATION ACT.

See Appeal to Supreme Court of British Columbia.

WRIT OF SUMMONS.

See Judgment, 1 — Principal and Agent, 1.

YUKON TERRITORIAL COURT.

See Appeal to Yukon Territorial Court.

Ex. D.N.
9/6 '5

Digitized by Google

Digitized by Google

# THE WESTERN LAW REPORTER CANADA

Vol. I. FEBRUARY 1, 1905. No. 1.

Subscription: Each volume 600 pages, $6.00.
Price per part of 25 pages, 50 cents.

EDITOR

E. B. BROWN, Esq.,
Barrister-at-Law.

REPORTERS

MANITOBA—The Reporter of the Manitoba Law Reports.

BRITISH COLUMBIA—P. S. Lampman, Esq., Barrister-at-Law, Supreme Court, Victoria.
G. E. McCrossan, Barrister-at-Law, Vancouver.
R. M. Macdonald, Barrister-at-Law, Nelson and Rossland.

NORTH-WEST TERRITORIES—Thomas Powell, Esq., Official Court Stenographer, Regina.
W. L. Waines, Esq., Barrister-at-Law, Calgary.
J. T. Brown, Esq., Barrister-at-Law, Moosomin.
A. E. Doak, Esq., Barrister-at-Law, Prince Albert.
S. E. Bolton, Esq., Advocate, Edmonton.
Thomas A. Powell, Esq., Official Court Stenographer, Macleod.

The Carswell Company, Limited

TORONTO, CANADA

Digitized by Google

# DART'S
# Vendors and Purchasers, 1905

Seventh Edition now nearly ready. Price in London £3 15s. It will be sold in Canada, in cloth, at $20, in half-calf $22. Orders received before publication in Toronto will be sent carriage paid.

**Address orders to**

**THE CARSWELL Co., LIMITED**

**LAW PUBLISHERS, ETC.**

**30 ADELAIDE ST. EAST, - - TORONTO.**

TORONTO, 9th January, 1905.


## TABLE OF CASES, Vol. I. No. 1


| | PAGE |
|---|---|
| Bakewell v. Mackenzie | 68 |
| Davies v. Canadian-American Coal and Coke Co | 55 |
| John Abell Co. v. Hornby | 3 |
| John Abell Co. v. Long | 34 |
| Johnson v. Appleton | 14 |
| Kerr v. Bowden | 28 |
| Kickbush v. Cawley | 18 |
| Lewis and Phalen, *Re* | 36 |
| McArthur v. McArthur | 1 |
| Murray v. Royal Ins. Co | 8 |
| Perkins v. Jones | 41 |
| Rex v. Mah Kee | 37 |
| Rex v. Massey-Harris Co | 45 |
| Rex v. Preston | 17 |
| Richards v. Williams | 9 |
| Spencer v. Drysdale | 6, 7 |
| Stimson v. Hamilton | 20 |
| Zacklynski v. Ketchinski | 39 |


Digitized by Google

# Lawyers in Western Canada

**Require the BEST LAW BOOKS Published, Latest Editions and Best Prices. We submit the following:—**

**DIGEST ONTARIO CASE LAW**, 4 large volumes—$50. Cash orders sent us in answer to this advertisement will be filled for $45.

**ANNUAL SUPPLEMENTS** to Digest Ontario Case Law, including the Cases of all the Reports outside of Ontario for each year from 1901 to 1903, three years in one volume, $10. Annual Digest for 1904 can be supplied as soon as published without further charge to all subscribers to the Canadian Law Times for 1904.

**MARTIN** (Hon. Mr. Justice), Mining Cases of British Columbia, volume 1, $20; supplement in continuation of the same will be issued on 1st March, volume 2, part 1, including all Cases up to the end of 1904.

**McPHERSON & CLARK'S LAW OF MINES.** We now supply this work at $10. The work embraces the Mining Laws of all the Provinces in Canada, and is frequently cited by counsel in the Courts where Mining Cases are involved.

**DICTIONARY OF LEGAL QUOTATIONS**; just published. London price, 10s. 6d.; net in Canada, $2.50.

**POLLOCK'S EXPANSION OF THE COMMON LAW.** London price, 6s.; Canada, net, $1.50. These two works will be supplied in one order for $3.50.

**LEGAL DIARY**, two days to a page, post free for $1.

[OVER]


Digitized by Google

**LAW JOURNAL REPORTS**: This is the oldest Series of Law Reports issued in England, covering all the High Courts and the House of Lords and Privy Council, etc. This is the 83rd year of its publication continued without a break, and there is scarcely any page of modern law text books that does not cite its Cases. It is issued in monthly parts and each year can be bound in two or three volumes, and an edition on thin paper can be bound in one volume. The subscription price in Canada is only $10 a year.

In a letter just received from the Hon. Wm. G. Falconbridge, Chief Justice of the King's Bench Division, we abstract the following: "I regard the Law Journal Reports, 1904, just received, as a marvellous production. There are about 2,663 pages in a compact volume printed in beautiful type." This refers to the edition on thin paper, the binding of which is now $1.50, making the Reports bound for the year 1904 only cost $11.50. We can supply sets from 1823 at a reduced price, and from 1866 to 1904, and another Series at a reduced price from 1837.

**THE REVISED REPORTS**: 71 volumes have been issued of this Series, and the Editors claim that it covers every Case of Live English Law from 1785 to the date covered by vol. 71. It is intended to issue the Series up to the Law Reports, including the year 1865. We can offer a good, second-hand set, beautifully bound in half colored calf, 71 volumes, for $240; continuations will be supplied at $4.80 a volume.

**LAW BOOK BINDING**: We have the best and most experienced staff and their whole time has been for years exclusively devoted to binding law books. The uniformity of our binding and quality of material, can be seen in every large Law Library in the Dominion. Doubtless the expense is greater on account of transportation, and if you are satisfied with local binders, we have no desire to compete with them; but for uniformity, first-class material and guaranteed work, send your Reports and Magazines for binding to the

CARSWELL COMPANY, LIMITED, TORONTO.

Digitized by Google

# THE WESTERN LAW REPORTER CANADA

Vol. I. FEBRUARY 15, 1905. No. 2.

Subscription: Each volume 600 pages, $6.00.
Price per part of 25 pages, 50 cents.

EDITOR

E. B. BROWN, Barrister-at-Law.

REPORTERS

MANITOBA—The Reporter of the Manitoba Law Reports.

BRITISH COLUMBIA—P. S. Lampman, Barrister-at-Law, Supreme Court Reporter, Victoria.

G. E. McCrossan, Barrister-at-Law, Vancouver.

R. M. Macdonald, Barrister-at-Law, Nelson and Rossland.

NORTH-WEST TERRITORIES — Thomas Powell, Official Court Stenographer, Regina.

W. L. Waines, Barrister-at-Law, Calgary.

J. T. Brown, Barrister-at-Law, Moosomin.

A. E. Doak, Barrister-at-Law, Prince Albert.

S. E. Bolton, Advocate, Edmonton.

Thomas A. Powell, Official Court Stenographer, Macleod.

J. Almon Valiquette, Court Reporter, Dawson, Y.T.

George Craig, Court Reporter, Dawson, Y.T.

The Carswell Company, Limited

TORONTO, CANADA

Digitized by Google

# DART'S
## Vendors and Purchasers, 1905

Seventh Edition now nearly ready. Price in London £3 15s. It will be sold in Canada, in cloth, at $20, in half-calf $22. Orders received before publication in Toronto will be sent carriage paid.

TORONTO, 9th January, 1905.

*340 pages in art cloth. London price, 10s. 6d., $2.50.*

# Dictionary of Legal Quotations
## SELECTED DICTA
OF
## English Chancellors and Judges

BY J. W. NORTON-KYSHE, BARRISTER, ETC.

**FOURTEEN YEARS' WORK**

ORDERS SOLICITED

**THE CARSWELL CO., Limited**

Law Publishers, - - TORONTO, ONT.


## TABLE OF CASES, Vol. I. No. 2


| | PAGE |
|---|---|
| Ayotte, *Re* | 79 |
| Black v. Wiebe | 73 |
| Cartwright v. The King | 83 |
| Dundass and Municipality of Chilliwack, *Re* | 94 |
| Grierson v. Johnston | 83 |
| Rex v. Canadian Pacific R. W. Co. | 89 |
| Rex *ex rel.* Park v. Street | 87 |


Digitized by Google

# Lawyers in Western Canada

**Require the BEST LAW BOOKS Published, Latest Editions and Best Prices. We submit the following:—**

**DIGEST ONTARIO CASE LAW**, 4 large volumes—$50. This Digest gives the key to cases in about 300 volumes of Canadian Law Reports.

**ANNUAL SUPPLEMENTS** to Digest Ontario Case Law, including the Cases of all the Reports outside of Ontario for each year from 1901 to 1903, three years in one volume, $10. Annual Digest for 1904 can be supplied as soon as published without further charge to all subscribers to the Canadian Law Times for 1904.

**MARTIN** (Hon. Mr. Justice), Mining Cases of British Columbia, volume 1, $20; supplement in continuation of the same will be issued on 1st March, volume 2, part 1, including all Cases up to the end of 1904.

**McPHERSON & CLARK'S LAW OF MINES.** We now supply this work at $10. The work embraces the Mining Laws of all the Provinces in Canada, and is frequently cited by counsel in the Courts where Mining Cases are involved.

**DICTIONARY OF LEGAL QUOTATIONS**; just published. London price, 10s. 6d.; net in Canada, $2.50.

**POLLOCK'S EXPANSION OF THE COMMON LAW**. London price, 6s.; Canada, net, $1.50. These two works will be supplied in one order for $3.50.

**LEGAL DIARY**, two days to a page, post free for $1.

[OVER]


Digitized by Google

**LAW JOURNAL REPORTS**: This is the oldest Series of Law Reports issued in England, covering all the High Courts and the House of Lords and Privy Council, etc. This is the 83rd year of its publication continued without a break, and there is scarcely any page of modern law text books that does not cite its Cases. It is issued in monthly parts and each year can be bound in two or three volumes, and an edition on thin paper can be bound in one volume. The subscription price in Canada is only $10 a year.

In a letter just received from the Hon. Wm. G. Falconbridge, Chief Justice of the King's Bench Division, we abstract the following: "I regard the Law Journal Reports, 1904, just received, as a marvellous production. There are about 2,663 pages in a compact volume printed in beautiful type." This refers to the edition on thin paper, the binding of which is now $1.50, making the Reports bound for the year 1904 only cost $11.50. We can supply sets from 1823 at a reduced price, and from 1866 to 1904, and another Series at a reduced price from 1837.

**THE REVISED REPORTS**: 71 volumes have been issued of this Series, and the Editors claim that it covers every Case of Live English Law from 1785 to the date covered by vol. 71. It is intended to issue the Series up to the Law Reports, including the year 1865. We can offer a good, second-hand set, beautifully bound in half colored calf, 71 volumes, for $240; continuations will be supplied at $4.80 a volume.

**LAW BOOK BINDING**: We have the best and most experienced staff and their whole time has been for years exclusively devoted to binding law books. The uniformity of our binding and quality of material, can be seen in every large Law Library in the Dominion. Doubtless the expense is greater on account of transportation, and if you are satisfied with local binders, we have no desire to compete with them; but for uniformity, first-class material and guaranteed work, send your Reports and Magazines for binding to the

CARSWELL COMPANY, LIMITED, TORONTO.

Digitized by Google

THE

# WESTERN LAW REPORTER CANADA

Vol. I. MARCH 1, 1905. No. 3.

Subscription: Each volume 600 pages, $6.00.
Price per part of 25 pages, 50 cents.

EDITOR

E. B. BROWN, Barrister-at-Law.

REPORTERS

MANITOBA—The Reporter of the Manitoba Law Reports.

BRITISH COLUMBIA—P. S. Lampman, Barrister-at-Law, Supreme Court Reporter, Victoria.

G. E. McCrossan, Barrister-at-Law, Vancouver.

R. M. Macdonald, Barrister-at-Law, Nelson and Rossland.

NORTH-WEST TERRITORIES — Thomas Powell, Official Court Stenographer, Regina.

W. L. Waines, Barrister-at-Law, Calgary.

J. T. Brown, Barrister-at-Law, Moosomin.

A. E. Doak, Barrister-at-Law, Prince Albert.

S. E. Bolton, Advocate, Edmonton.

Thomas A. Powell, Official Court Stenographer, Macleod.

J. Aimon Valiquette, Court Reporter, Dawson, Y.T.

George Craig, Court Reporter, Dawson, Y.T.

The Carswell Company, Limited

TORONTO, CANADA

Digitized by Google

# ODGERS'
## Libel and Slander, 1905

We have this day received notice from the Publishers that Odgers (W. B.), LL.D., K.C., on Libel and Slander, Fourth Edition, is nearly ready, to be published in London at 32s. We will supply in half-calf at $9, and all orders received previous to the book reaching Toronto will be sent carriage paid. 50 cents discount for libraries' certificate.

*340 pages in art cloth. London price, 10s. 6d., $2.50.*

# Dictionary of Legal Quotations

## SELECTED DICTA

OF

## English Chancellors and Judges

BY J. W. NORTON-KYSHE, BARRISTER, ETC.

**FOURTEEN YEARS' WORK**

ORDERS SOLICITED

**THE CARSWELL CO., Limited**

**Law Publishers, - - TORONTO, ONT.**


## TABLE OF CASES, Vol. I. No. 3


PAGE

Alaska Packers' Association v. Spencer ..... 105
Cartwright v. The King ..... 108
Davies v. Canadian-American Coal and Coke Co. ..... 97
Gougeon v. Thompkins ..... 114
Jackson v. Drake ..... 97
Lilly, *Re* ..... 117
Peirson v. Canada Permanent and Western Canada Mortgage Corporation ..... 99
Rex v. Hostyn ..... 113
Watts v. Hehsdoerfer ..... 105, 110


Digitized by Google

# Digest Ontario Case Law

**FOUR LARGE VOLUMES—$50**

**This Digest gives the key to cases in about 300 volumes of Ontario Law Reports**

**ANNUAL SUPPLEMENTS** to Digest Ontario Case Law, including the Cases of all the Reports outside of Ontario for each year from 1901 to 1903, three years in one volume, $10. Annual Digest for 1904 can be supplied as soon as published without further charge to all subscribers to the Canadian Law Times for 1904.

---

**MARTIN** (Hon. Mr. Justice), Mining Cases of British Columbia, volume 1, $20; supplement in continuation of the same will be issued on 1st March, volume 2, part 1, including all Cases up to the end of 1904.

**McPHERSON & CLARK'S LAW OF MINES.** We now supply this work at $10. The work embraces the Mining Laws of all the Provinces in Canada, and is frequently cited by counsel in the Courts where Mining Cases are involved.

**DICTIONARY OF LEGAL QUOTATIONS**; just published. London price, 10s. 6d.; net in Canada, $2.50.

**POLLOCK'S EXPANSION OF THE COMMON LAW.** London price, 6s.; Canada, net, $1.50. These two works will be supplied in one order for $3.50.

**LEGAL DIARY**, two days to a page, post free for $1.

[OVER]


Digitized by Google

**LAW JOURNAL REPORTS**: This is the oldest Series of Law Reports issued in England, covering all the High Courts and the House of Lords and Privy Council, etc. This is the 83rd year of its publication continued without a break, and there is scarcely any page of modern law text books that does not cite its Cases. It is issued in monthly parts and each year can be bound in two or three volumes, and an edition on thin paper can be bound in one volume. The subscription price in Canada is only $10 a year.

In a letter just received from the Hon. Wm. G. Falconbridge, Chief Justice of the King's Bench Division, we abstract the following: "I regard the Law Journal Reports, 1904, just received, as a marvellous production. There are about 2,663 pages in a compact volume printed in beautiful type." This refers to the edition on thin paper, the binding of which is now $1.50, making the Reports bound for the year 1904 only cost $11.50. We can supply sets from 1823 at a reduced price, and from 1866 to 1904, and another Series at a reduced price from 1837.

**THE REVISED REPORTS**: 71 volumes have been issued of this Series, and the Editors claim that it covers every Case of Live English Law from 1785 to the date covered by vol. 71. It is intended to issue the Series up to the Law Reports, including the year 1865. We can offer a good, second-hand set, beautifully bound in half colored calf, 71 volumes, for $240; continuations will be supplied at $4.80 a volume.

**LAW BOOK BINDING**: We have the best and most experienced staff and their whole time has been for years exclusively devoted to binding law books. The uniformity of our binding and quality of material, can be seen in every large Law Library in the Dominion. Doubtless the expense is greater on account of transportation, and if you are satisfied with local binders, we have no desire to compete with them; but for uniformity, first-class material and guaranteed work, send your Reports and Magazines for binding to the

CARSWELL COMPANY, LIMITED, TORONTO.

Digitized by Google

THE

# WESTERN LAW REPORTER CANADA

Vol. I. MARCH 15, 1905 No. 4.

Subscription: Each volume 600 pages, $6.00.
Price per part of 25 pages, 50 cents.

EDITOR

E. B. BROWN, Barrister-at-Law.

REPORTERS

MANITOBA—The Reporter of the Manitoba Law Reports.

BRITISH COLUMBIA—P. S. Lampman, Barrister-at-Law, Supreme Court Reporter, Victoria.

G. E. McCrossan, Barrister-at-Law, Vancouver.

R. M. Macdonald, Barrister-at-Law, Nelson and Rossland.

NORTH-WEST TERRITORIES — Thomas Powell, Official Court Stenographer, Regina.

W. L. Waines, Barrister-at-Law, Calgary.

J. T. Brown, Barrister-at-Law, Moosomin.

A. E. Doak, Barrister-at-Law, Prince Albert.

S. E. Bolton, Advocate, Edmonton.

Thomas A. Powell, Official Court Stenographer, Macleod.

J. Almon Valiquette, Court Reporter, Dawson, Y.T.

George Craig, Court Reporter, Dawson, Y.T.

The Carswell Company, Limited

TORONTO, CANADA

Digitized by Google

**LAW JOURNAL REPORTS**: This is the oldest Series of Law Reports issued in England, covering all the High Courts and the House of Lords and Privy Council, etc. This is the 83rd year of its publication continued without a break, and there is scarcely any page of modern law text books that does not cite its Cases. It is issued in monthly parts and each year can be bound in two or three volumes, and an edition on thin paper can be bound in one volume. The subscription price in Canada is only $10 a year.

In a letter just received from the Hon. Wm. G. Falconbridge, Chief Justice of the King's Bench Division, we abstract the following: "I regard the Law Journal Reports, 1904, just received, as a marvellous production. There are about 2,663 pages in a compact volume printed in beautiful type." This refers to the edition on thin paper, the binding of which is now $1.50, making the Reports bound for the year 1904 only cost $11.50. We can supply sets from 1823 at a reduced price, and from 1866 to 1904, and another Series at a reduced price from 1837.

**THE REVISED REPORTS**: 71 volumes have been issued of this Series, and the Editors claim that it covers every Case of Live English Law from 1785 to the date covered by vol. 71. It is intended to issue the Series up to the Law Reports, including the year 1865. We can offer a good, second-hand set, beautifully bound in half colored calf, 71 volumes, for $240; continuations will be supplied at $4.80 a volume.

**LAW BOOK BINDING**: We have the best and most experienced staff and their whole time has been for years exclusively devoted to binding law books. The uniformity of our binding and quality of material, can be seen in every large Law Library in the Dominion. Doubtless the expense is greater on account of transportation, and if you are satisfied with local binders, we have no desire to compete with them; but for uniformity, first-class material and guaranteed work, send your Reports and Magazines for binding to the

CARSWELL COMPANY, LIMITED, TORONTO.

Digitized by Google

THE

# WESTERN LAW REPORTER CANADA

Vol. I. MARCH 15, 1905 No. 4.

Subscription: Each volume 600 pages, $6.00.
Price per part of 25 pages, 50 cents.

EDITOR

E. B. BROWN, Barrister-at-Law.

REPORTERS

MANITOBA—The Reporter of the Manitoba Law Reports.

BRITISH COLUMBIA—P. S. Lampman, Barrister-at-Law, Supreme Court Reporter, Victoria.

G. E. McCrossan, Barrister-at-Law, Vancouver.

R. M. Macdonald, Barrister-at-Law, Nelson and Rossland.

NORTH-WEST TERRITORIES — Thomas Powell, Official Court Stenographer, Regina.

W. L. Waines, Barrister-at-Law, Calgary.

J. T. Brown, Barrister-at-Law, Moosomin.

A. E. Doak, Barrister-at-Law, Prince Albert.

S. E. Bolton, Advocate, Edmonton.

Thomas A. Powell, Official Court Stenographer, Macleod.

J. Almon Valiquette, Court Reporter, Dawson, Y.T.

George Craig, Court Reporter, Dawson, Y.T.

The Carswell Company, Limited

TORONTO, CANADA

Digitized by Google

# TWO NEW AND EXHAUSTIVE WORKS

## The Law of CONTRACTS

**By WILLIAM H. PAGE.**

Professor of Law, Ohio State University.

This work is included in three large volumes of 3,200 pages. To Libraries **$18.00**

---

## ELLIOTT

ON THE

## LAW OF EVIDENCE

**By B. K ELLIOTT and W. F. ELLIOTT**

Authors of "Roads and Streets" and "Railroads."

This work on EVIDENCE is the labour and experience of a lifetime; in four large volumes and is a treatise considering every phase of the subject from a practical standpoint. To libraries **$24.**

Circulars will be sent on applica ion.

---

**THE CARSWELL CO., Limited, 30 Adelaide St. E., Toronto.**


---

## TABLE OF CASES, Vol. I, No. 4


| | PAGE |
|---|---|
| Barrette v. Canadian Bank of Commerce | 171 |
| Bell v. Rokeby | 124 |
| Brown v. Spruce Creek Power Co. | 143 |
| Dickinson v. Robertson | 142 |
| Dodds v. Morrison | 164 |
| Dreger v. Canadian Northern R. W. Co. | 126 |
| Galley v. Galley | 155 |
| Gibbins v. Metcalfe | 139 |
| Hardaker, *Re* | 161 |
| Imperial Bank of Canada v. Twyford | 157 |
| Joshua Handy Machine Works v. Pace | 156 |
| Klassen v. Wright | 158 |
| Maneer v. Sanford | 128 |
| McNaughton Co. v. Hamel | 169 |
| Moyie Lumber and Milling Co. v. May | 152 |
| Rex v. Osberg | 121 |
| Rex v. Wasyl Kapij | 130 |
| Russell v. McKerchar | 138 |


Digitized by Google

*Second edition, in three large volumes. London price, cloth, four guineas, in half morocco, £5. Price in Canada, free of duty in half calf, $15.00; in half morocco, $16.00 (cloth copies not kept in stock.)*

# The Judicial Dictionary

—OF—

## Words and Phrases Judicially Interpreted

—BY THE—

## BRITISH JUDGES AND PARLIAMENT

—BY—

## F. STROUD,

Of Lincoln's Inn, Barrister-at-law, Recorder of Tewkesbury.

---

### Publishers' Notice.

It is believed this work is unique. It had no predecessor, and has no rival. Its idea is not only that it may be of frequent practical utility to the English-speaking lawyer, but that it may become the authoritative Interpreter of the English of Affairs for the British Empire.

The decisions of the English Judges are, and will remain, the central source whence this authoritative exposition must come, though Irish, Scotch, and Colonial decisions should harmonise and elucidate.

To formulate the English judicial interpretations from the earliest times down to the end of the nineteenth century and therewith to blend, or refer to, the statutory definitions of the High Court of Parliament, has been the endeavor of this Edition.

A considerable number of Irish decisions and some from Scotland and the United States have been treated in this Edition.

Statutory definitions are now brought within the scope of the work. It is believed that, approximately, all of practical utility down to the end of the nineteenth century are referred to, whilst many are set out at length or blended with judicial interpretations.

This work differs entirely from the Law Lexicons of Wharton and Sweet. It is a Dictionary of the English Language (in its phrases as well as single words) so far as that language has received interpretation by the British Judges and Parliament from the earliest times to the end of the nineteenth century.

Cases are cited in support of every definition. About 25,000 words and phrases are defined, and nearly 20,000 cases are cited.

It is frequently cited in the High Court, and is an indispensable aid for draughting all kinds of documents and construing them, and for the interpretation of Acts of Parliament.

### What the Judges said of the First Edition.

"I often have had occasion to use it, and always found its assistance valuable."—The late LORD BOWEN.
"An excellent idea; very well done."—The late LORD CHIEF JUSTICE COLERIDGE.
"I have often found it useful."—LORD LINDLEY.
"Valuable and interesting."—LORD JUSTICE MATHEW.
"A most useful work."—MR. JUSTICE GRANTHAM.
"Most valuable."—MR. JUSTICE JELF.

### Press Notices of the First Edition.

"A remarkable book."—LAW TIMES.
"Very excellent and comprehensive."—LAW JOURNAL.
"We recently took much trouble to collect definitions for the purposes of a Case. If Mr. Stroud's book had been before us, this labor would have been saved."—SOLICITORS' JOURNAL.
"This is an absolutely new departure. Will prove the greatest assistance to every practising barrister and solicitor."—LAW GAZETTE.

---

**Price $15.00 and if cash sent with order, books will be sent carriage prepaid.**

Digitized by Google

# REVISED REPORTS

EDITED BY

SIR FRED'K POLLOCK, Bart.

ASSISTED BY

O. A. SAUNDERS, A. B. CRANE, and
J. G. PEASE, Barristers.

**This is the only series of English Law Reports that contains all the live English Law to date of publication, 1785-1847, 72 Volumes. To be continued to the Law Reports, 1865.**

SPECIAL TERMS FOR CANADA

---

Address orders to

THE CARSWELL Co., LIMITED
LAW PUBLISHERS, ETC.
30 ADELAIDE ST. EAST, - - TORONTO.

Digitized by Google

# THE WESTERN LAW REPORTER CANADA

Vol. I. APRIL 1, 1905. No. 5.

Subscription: Each volume 600 pages, $6.00.
Price per part of 25 pages, 50 cents.

EDITOR

E. B. BROWN, Barrister-at-Law.

REPORTERS

MANITOBA—The Reporter of the Manitoba Law Reports.

BRITISH COLUMBIA—P. S. Lampman, Barrister-at-Law, Supreme Court Reporter, Victoria.

G. E. McCrossan, Barrister-at-Law, Vancouver.

R. M. Macdonald, Barrister-at-Law, Nelson and Rossland.

NORTH-WEST TERRITORIES — Thomas Powell, Official Court Stenographer, Regina.

W. L. Waines, Barrister-at-Law, Calgary.

J. T. Brown, Barrister-at-Law, Moosomin.

A. E. Doak, Barrister-at-Law, Prince Albert.

S. E. Bolton, Advocate, Edmonton.

Thomas A. Powell, Official Court Stenographer, Macleod.

J. Almon Valiquette, Court Reporter, Dawson, Y.T.

George Craig, Court Reporter, Dawson, Y.T.

The Carswell Company, Limited

TORONTO, CANADA

Digitized by Google

NOW READY.

# DART'S
## Vendors and Purchasers, 1905

Seventh Edition. Price in London £3 15s. Price in Canada, Cloth $20, Half-Calf $22. With Librarian's Certificate Discount $2.

# ODGERS'
## Libel and Slander, 1905

Fourth Edition ready. London price, 32s. Price in Canada, cloth $8, half-calf $9. Librarian's certificate deduct 50 cents.

"The best modern book on the law of libel."—*Daily News.*

"The most scientific of all our law books—in its new dress this volume is secure of an appreciative professional welcome—*Law Times.*

"The general opinion of the profession has always accorded a high place to Mr. Blake Odgers' learned work." —*Law Journal.*

## TABLE OF CASES, Vol. I. No. 5

| | PAGE |
|---|---|
| Alaska Packers Association v. Spencer | 188 |
| Bowker and Richards, *Re* | 194 |
| Canadian Bank of Commerce v. Butler | 173 |
| Cann, *Re* | 206 |
| Colwill v. Johnson | 218 |
| Curle v. City of Brandon | 176 |
| Ferris v. Canadian Northern R. W. Co | 177 |
| Gamble v. Spencer | 189 |
| Gourmany v. Manitoba Club | 175 |
| Harrod v. Watt | 216 |
| Howe v. Schroeder | 174 |
| Kennedy v. Joyce | 197 |
| Lequime v. Brown | 193 |
| Massey-Harris Co. v. Lowe | 213 |
| Massey-Harris Co. v. Moore | 215 |
| Pease v. Johnston | 208 |
| Rex ex rel. Park v. Street | 202 |
| Rogers v. Frechette | 190 |
| Scott v. Tasker | 199 |
| Tarry v. West Kootenay Power and Light Co | 186 |
| Walker v. Robinson | 181 |
| Young v. West Kootenay Shingle Co | 184 |

Digitized by Google

HAVE YOU USED THE

# Revised Reports?

Have you failed to find a useful case in the period covered—1785-1847?

What is the use of filling shelves with material obsolete?

## Revised Reports

give all the live law of England. 72 volumes are published. They are really

## ANNOTATED

not merely occasional references taken from the Digest which you must have in order to use those English Reports.

REVISED REPORTS ARE ALL RIGHT

---

THE CARSWELL COMPANY, LIMITED

30 ADELAIDE STREET EAST TORONTO, ONT.

Digitized by Google

# LIBRARY

## Just Purchased

And Bargains Will be Given on the Following:

**MASSACHUSETTS REPORTS, 173 VOLS.** bound in 98 vols. and Kennen's Digest of vols. 1-150, in good library condition, uniform binding, one only set. Vols. 174-186 can be supplied to complete the set for $29. The complete set, 187 vols. (in 128), for $187.

**NOVA SCOTIA REPORTS,** *Complete Set,* binding sound, but not uniform.

**LAW REPORTS, LONDON, 1866-1904,** complete set, binding sound throughout and uniform. Fine set.

**CANADA SUPREME COURT REPORTS,** complete set, 34 vols., uniform binding, half-calf, first-class condition.

Nearly a complete set of the

**ENGLISH LAW REPORTS PRIOR TO 1866**

A Large Quantity of **VALUABLE TEXT BOOKS**

***THE CARSWELL COMPANY,*** *Limited,*

*Law Book Publishers, Etc.,*

*30 Adelaide St. East. - - - TORONTO*


Digitized by Google

THE

# WESTERN LAW REPORTER CANADA

Vol. I. APRIL 15, 1905. No. 6

Subscription: Each volume 600 pages, $6.00.
Price per part of 25 pages, 50 cents.

EDITOR

E. B. BROWN, Barrister-at-Law.

REPORTERS

MANITOBA—The Reporter of the Manitoba Law Reports.

BRITISH COLUMBIA—P. S. Lampman, Barrister-at-Law, Supreme Court Reporter, Victoria.

G. E. McCrossan, Barrister-at-Law, Vancouver.

R. M. Macdonald, Barrister-at-Law, Nelson and Rossland.

NORTH-WEST TERRITORIES — Thomas Powell, Official Court Stenographer, Regina.

W. L. Waines, Barrister-at-Law, Calgary.

J. T. Brown, Barrister-at-Law, Moosomin.

A. E. Doak, Barrister-at-Law, Prince Albert.

S. E. Bolton, Advocate, Edmonton.

Thomas A. Powell, Official Court Stenographer, Macleod.

J. Almon Valiquette, Court Reporter, Dawson, Y.T.

George Craig, Court Reporter, Dawson, Y.T.

The Carswell Company, Limited

TORONTO, CANADA

Digitized by Google

# British Statutes

Magna Charta to 1869, inclusive, 47 4to. vols. Newly re-backed, in sound condition, complete set, $55.00.

# Partnership

A Treatise on the Law of Partnership, by the Right Hon. Sir Nathaniel Lindley, Knt., one of the Lords Justices of Her Majesty's Court of Appeal. A new edition of this work is expected to be ready in London during the present month. Edited by His Honour Judge Lindley and Mr. T. J. C. Tomlin. Nearly twelve years have elapsed since the former edition. London price in cloth, 38s. To be supplied in Canada in half-calf, $9. Libraries sending certificate for free entry previous to date of publication will be supplied in half-calf, at $8.50.

# Large Wall Map

OF THE

## Dominion of Canada and Newfoundland

**55 x 104 inches**

**Issued by the Department of the Interior in 1902. Scale 35 miles to the inch, mounted on linen and roller.**

**offered at $6.00.**


## TABLE OF CASES, Vol. I. No. 6


| | PAGE |
|---|---|
| Attorney-General for North-West Territories and Canada Settlers Loan and Trust Co., *Re* | 235 |
| Bockfinger v. Murray | 260 |
| Canadian Bank of Commerce v. Carbonneau | 262 |
| Canadian Bank of Commerce v. McDonald | 271 |
| Centre Star Mining Co. v. Rossland Miners Union No. 38 | 244 |
| Doherty v. Vancouver Gas Co | 252 |
| Gold Run Klondike Mining Co. v. Charbonneau | 254 |
| Krienke v. Mohr | 254 |
| McCallum v. Williams | 257 |
| McIlvride v. Mills | 229 |
| McKinnon v. Minatty | 272 |
| Racine v. McGinnity | 265 |
| Smith v. Galbraith | 227 |
| Smith v. Public Parks Board of Portage La Prairie | 237 |


Digitized by Google

# Law Journal Reports.

As an instance of the value of the above Reports the Publishers state that out of 143 cases reported in Vol. 71, Revised Reports, 104 are contained in the Law Journal Reports. The Law Journal is the best series; its cases are reported promptly, accurately, and fully. It is the most moderate in price. Its period covers from the year 1823 to the present date; but its most valuable portion is from the period 1837 to date, a short time previous to which the Reports were received as a recognized authority of citation in the English Courts.

Subscribers in Canada are supplied these Reports at an annual subscription of $10.00, and a thin paper edition of these Reports can be bound in one volume and supplied at $11.50. What Lawyer of good practice need be without English Reports, when they can be had in a bound volume for $11.50 a year?

# Benjamin on Sale

The Publishers state in reference to this work that the new edition has involved more labour than was anticipated; and the Editors state that they have checked every reference, and verified all Mr. Benjamin's statements. There is little doubt that this edition will be an improvement on the preceding ones. The price in London, the Publishers state, will be from 30s. to 40s., to be supplied in Canada as soon as published, in half-calf, at $6.50 Librarians sending us certificate previous to publication will receive the same at $6.00.

Digitized by Google

NOW READY.

# DART'S
## Vendors and Purchasers, 1905

Seventh Edition. Price in London £3 15s. Price in Canada, Cloth $20, Half-Calf $22. With Librarian's Certificate Discount $2.

# ODGERS'
## Libel and Slander, 1905

Fourth Edition ready. London price, 32s. Price in Canada, cloth $8, half-calf $9. Librarian's certificate deduct 50 cents.

"The best modern book on the law of libel."—*Daily News.*

"The most scientific of all our law books—in its new dress this volume is secure of an appreciative professional welcome—*Law Times.*

"The general opinion of the profession has always accorded a high place to Mr. Blake Odgers' learned work."—*Law Journal.*

SUPPLEMENT. NOW READY.

# MARTIN'S MINING CASES
OF
## BRITISH COLUMBIA
WITH
## STATUTES
BY THE HON. MR. JUSTICE MARTIN

VOL. II., PART I., $6.

THE CARSWELL CO., Limited, LAW PUBLISHERS 30 ADELAIDE ST. E. TORONTO

Digitized by Google

THE

# WESTERN LAW REPORTER CANADA

Vol. I. MAY 1, 1905. No. 7

Subscription: Each volume 600 pages, $6.00.
Price per part of 25 pages, 50 cents.

EDITOR

E. B. BROWN, Barrister-at-Law.

REPORTERS

MANITOBA—The Reporter of the Manitoba Law Reports.

BRITISH COLUMBIA—P. S. Lampman, Barrister-at-Law, Supreme Court Reporter, Victoria.

G. E. McCrossan, Barrister-at-Law, Vancouver.

R. M. Macdonald, Barrister-at-Law, Nelson and Rossland.

NORTH-WEST TERRITORIES—Thomas Powell, Official Court Stenographer, Regina.

W. L. Waines, Barrister-at-Law, Calgary.

J. T. Brown, Barrister-at-Law, Moosomin.

A. E. Doak, Barrister-at-Law, Prince Albert.

S. E. Bolton, Advocate, Edmonton.

Thomas A. Powell, Official Court Stenographer, Macleod.

J. Almon Valiquette, Court Reporter, Dawson, Y.T.

George Craig, Court Reporter, Dawson, Y.T.

The Carswell Company, Limited

TORONTO, CANADA

Digitized by Google

# Digest Ontario Case Law

**FOUR LARGE VOLUMES—$50**

**This Digest gives the key to cases in about 300 volumes of Ontario Law Reports**

**ANNUAL SUPPLEMENTS** to Digest Ontario Case Law, including the Cases of all the Reports outside of Ontario for each year from 1901 to 1904, four years in one volume, $12.

---

**MARTIN** (Hon. Mr. Justice), Mining Cases of British Columbia, volume 1, $20; supplement in continuation of the same, volume 2, part 1, including all Cases up to the end of 1904, $5.

**McPHERSON & CLARK'S LAW OF MINES.** We now supply this work at $10. The work embraces the Mining Laws of all the Provinces in Canada, and is frequently cited by counsel in the Courts where Mining Cases are involved.

**DICTIONARY OF LEGAL QUOTATIONS**; just published. London price, 10s. 6d.; net in Canada, $2.50.

**POLLOCK'S EXPANSION OF THE COMMON LAW.** London price, 6s.; Canada, net, $1.50.

The two last above works will be supplied in one order for $3.50.


---

## TABLE OF CASES, Vol. I. No. 7


| | PAGE |
|---|---|
| Anglo-Klondike Mining Co. v. Cook | 322 |
| Attorney-General for British Columbia v. Canadian Pacific R. W. Co. | 299 |
| Carbonneau v. Latourneau | 273 |
| Carman, Village of, v. Fisher | 276 |
| Centre Star Mining Co. v. Rossland-Kootenay Mining Co. | 313 |
| Knudson and Town of St. Boniface, *Re* | 281 |
| Lisle v. De Lion | 274 |
| Macarthur v. Hastings | 285 |
| McKenzie v. Kayler | 290 |
| Morgan v. British Yukon Co. | 304 |
| Peck v. Sun Life Assurance Co. of Canada | 302 |
| Wilson v. Graham | 278 |


Digitized by Google

*New ready (London, cloth, 38s.), in Toronto, half-calf, $9.*

# Partnership

A Treatise on the Law of Partnership, by the Right Hon. Sir Nathaniel Lindley, Knt., one of the Lords Justices of Her Majesty's Court of Appeal. A new edition now ready. Edited by His Honour Judge Lindley and Mr. T. J. C. Tomlin. Nearly twelve years have elapsed since the former edition. London price in cloth, 38s. To be supplied in Canada in half-calf, $9. Libraries at special price.

# Law Journal Reports

"All Reports made by gentlemen of the Bar and published on their responsibility are equally regular. There is no superiority in the Reports of the Council of Law Reporting. Counsel are as much entitled to cite the one as the other."—THE MASTER OF THE ROLLS, *Times L. R.*, 21st May, 1887.

As an instance of the value of the above Reports the Publishers state that out of 143 cases reported in Vol. 71, Revised Reports, 104 are contained in the Law Journal Reports. The Law Journal is the best series; its cases are reported promptly, accurately, and fully. It is the most moderate in price. Its period covers from the year 1822 to the present date; but its most valuable portion is from the period 1837 to date, a short time previous to which the Reports were received as a recognized authority of citation in the English Courts.

Subscribers in Canada are supplied these Reports at an annual subscription of $10.00, and a thin paper edition of these Reports can be bound in one volume and supplied at $11.50. What Lawyer of good practice need be without English Reports, when they can be had in a bound volume for $11.50 a year?

Digitized by Google

## New Brunswick

Digest of Cases to end of 1897, by His Honor Judge Stevens, one very thick volume, $20.

## Canada

Supreme Court Digest of Cases contained in Vols. 1-33 inclusive; in one volume $12.50.

## Ontario

Case Law Digest complete in 4 large volumes to the end of 1900. Half-calf, $50. Annual Supplements for 1901-1904 bound in one volume, $12.

## Nova Scotia

Digest of Cases contained in Vols. 1-34; two volumes, $25.

## British Columbia

Digest of the Cases contained in Vols. 1-10; one volume (will be published at an early date.)

Digitized by Google

THE

# WESTERN LAW REPORTER CANADA

Vol. I. JUNE 1, 1905. No. 8

Subscription: Each volume 600 pages, $6.00.
Price per part of 25 pages, 50 cents.

EDITOR

E. B. BROWN, Barrister-at-Law.

REPORTERS

MANITOBA—The Reporter of the Manitoba Law Reports.

BRITISH COLUMBIA—P. S. Lampman, Barrister-at-Law, Supreme Court Reporter, Victoria.

G. E. McCrossan, Barrister-at-Law, Vancouver.

R. M. Macdonald, Barrister-at-Law, Nelson and Rossland.

NORTH-WEST TERRITORIES — Thomas Powell, Official Court Stenographer, Regina.

W. L. Waines, Barrister-at-Law, Calgary.

J. T. Brown, Barrister-at-Law, Moosomin.

A. E. Doak, Barrister-at-Law, Prince Albert.

S. E. Bolton, Advocate, Edmonton.

Thomas A. Powell, Official Court Stenographer, Macleod.

J. Almon Valiquette, Court Reporter, Dawson, Y.T.

George Craig, Court Reporter, Dawson, Y.T.

The Carswell Company, Limited

TORONTO, CANADA

Digitized by Google

NOW READY.

London price 32s., cloth. Toronto, half-calf, $9.

# Odgers' Libel and Slander

## 1905

Fourth edition, half-calf, $9. Will be sent express prepaid on receipt of price.

"The best modern book on the law of libel."—*Daily News.*

"The most scientific of all our law books—in its new dress this volume is secure of an appreciative professional welcome.—*Law Times.*

"The general opinion of the profession has always accorded a high place to Mr. Blake Odgers' learned work."—*Law Journal.*

NOW READY.

# DART'S VENDORS AND PURCHASERS

## 1905

Seventh Edition. Price in London £3 15s. in cloth; in Toronto at $20; in half-calf, $22. Will be sent express prepaid on receipt of price.

## TABLE OF CASES, Vol. I. No. 8

PAGE

Bocz v. Spiller ..... 366
Canadian Bank of Commerce v. Carbonneau ..... 399
Caswell and Rural Municipality of South Norfolk, *Re* ..... 327
Centre Star Mining Co. v. Rossland-Kootenay Mining Co. ..... 336
Chan Dy Chea v. Alberta Railway and Irrigation Co. ..... 371
Cooper v. Yorkshire Guarantee Co. ..... 337
Duggan v. Canadian Pacific R. W. Co. ..... 356
Dundas v. Osmont ..... 363
Eggleston v. Canadian Pacific R. W. Co. ..... 356
Fortin v. Pound ..... 333
Graves v. McDonald ..... 325
Harvey v. Silzer ..... 360
Hogan v. Bactz ..... 393
Hogan v. Bactz and Taylor ..... 393
Ireland v. Andrews ..... 346
Jobin-Marrin Co. v. Betts ..... 369
Kerr v. Brown ..... 379
McAuley v. Dick ..... 381
McCaul v. Christie ..... 332
McFee v. Young ..... 383
Plisson v. Diemert ..... 359
Rex v. Charles King ..... 348
Rex v. Flynn, *Re* ..... 389
Ross Brothers Limited v. Pearson ..... 388
Stearns v. Kimmell ..... 390
Tjerstrom, *Re* ..... 385
Wilson v. Rannie ..... 397

Digitized by Google

# Digest Ontario Case Law

TO JANUARY 1ST, 1901

4 LARGE VOLUMES $50

This Digest gives the key to cases in about 300 volumes Law Reports of Ontario

---

# Annual Supplements

## To Digest Ontario Case Law

Including the Cases of all the Reports outside of Ontario for each year from 1901 to 1904, four years in one volume, $12.

---

**MARTIN** (Hon. Mr. Justice), Mining Cases of British Columbia, volume 1, $20; supplement in continuation of the same, volume 2, part 1, including all Cases up to the end of 1904, $5.

**McPHERSON & CLARK'S LAW OF MINES.** We now supply this work at $10. The work embraces the Mining Laws of all the Provinces in Canada, and is frequently cited by counsel in the Courts where Mining Cases are involved.

**DICTIONARY OF LEGAL QUOTATIONS**; just published. London price, 10s. 6d.; net in Canada, $2.50.

**POLLOCK'S EXPANSION OF THE COMMON LAW.** London price, 6s.; Canada, net, $1.50.

The two last above works will be supplied in one order for $3.50.

---

THE CARSWELL CO., LIMITED

LAW PUBLISHERS

30 ADELAIDE STREET EAST, - - TORONTO, CANADA


Digitized by Google

# THE LAW JOURNAL REPORTS.

**The Oldest-established Reports, Commencing 1822.**

These old-established REPORTS are now in their 83rd year of existence, and the Proprietors would draw the attention of the Profession to some of the points upon which excellence is claimed for them.

## 1. SIMPLICITY OF ARRANGEMENT AND FACILITY OF REFERENCE—

There is only one volume in each year for each Division of the Courts.

The LAW JOURNAL REPORTS and Statutes for each year may be conveniently bound in 3 vols., or if thin paper is used, it can be bound in one convenient volume. The system of citation has not been materially altered for over 60 years.

## 2. CONCISENESS AND ACCURACY—

The LAW JOURNAL REPORTS form by far the most extensive and authoritative series of English Reports extant. The Editors have always endeavoured, and it is believed with success, to avoid prolixity, both in the head notes and in the statement of facts, and to restrict the Reports of Cases so far as is possible to the elucidation of the points of law decided in them. ON THE QUESTION OF ACCURACY the LAW JOURNAL REPORTS have NEVER been impeached.

## 3. MODERATE PRICE—

The subscription of the LAW JOURNAL, the LAW JOURNAL REPORTS, and the Statutes of the current session is only **£4 4s.** per annum.

---

The above is the London Publisher's Advertisement. We supply the same in Canada at $18.50, or separately as follows

| | | |
|---|---|---|
| Law Journal Reports | only | $10 00 |
| Statutes | " | 2 00 |
| Law Journal, Weekly | " | 6 50 |

Thin paper issue will be supplied at the same price a year, $10. It can be bound in one neat volume, so that the year's reports will only cost $11.50.

Subscribers to Law Journal Reports are entitled to purchase "Mews' Annual Digest" with its quarterly issues for the same year, at $2.00.

---

**THE CARSWELL COMPANY, Limited,**

**LAW PUBLISHERS, 30 Adelaide Street East, Toronto**


Digitized by Google

THE

# WESTERN LAW REPORTER CANADA

Vol. I. JULY 3, 1905. No. 9

Subscription: Each volume 600 pages, $6.00.
Price per part of 25 pages, 50 cents.

EDITOR

E. B. BROWN, Barrister-at-Law.

REPORTERS

MANITOBA—The Reporter of the Manitoba Law Reports.

BRITISH COLUMBIA—P. S. Lampman, Barrister-at-Law, Supreme Court Reporter, Victoria.

G. E. McCrossan, Barrister-at-Law, Vancouver.

R. M. Macdonald, Barrister-at-Law, Nelson.

E. S. H. Winn, Barrister-at-Law, Rossland.

NORTH-WEST TERRITORIES — Thomas Powell, Official Court Stenographer, Regina.

W. L. Waines, Barrister-at-Law, Calgary.

J. T. Brown, Barrister-at-Law, Moosomin.

A. E. Doak, Barrister-at-Law, Prince Albert.

S. E. Bolton, Advocate, Edmonton.

Thomas A. Powell, Official Court Stenographer, Macleod.

J. Almon Valiquette, Court Reporter, Dawson, Y.T.

George Craig, Court Reporter, Dawson, Y.T.

The Carswell Company, Limited

TORONTO, CANADA

Digitized by Google

**HAVE YOU PURCHASED THE FOLLOWING NEW BOOKS PUBLISHED IN 1905.**

LINDLEY ON PARTNERSHIP, 7th ed. (38s.), cloth $8.50, hf. calf $9.00.

KERR ON RECEIVERS, 5th ed. (cloth 10s.), hf. bound $2.50.

POLLOCK'S EXPANSION OF THE COMMON LAW, $1.50.

NORTON-KYSHE'S DICTIONARY OF JUDGES' DICTA, $2.50, or Pollock & Kyshe, the two for $3.50.

**SOON TO ISSUE:**

BENJAMIN ON SALE, probable London price 40s. to 42s., will be sold by us in half calf at $6.50.

## TABLE OF CASES, Vol. I, No. 9

PAGE

Alaska Mercantile Co. v. Ballantine ..... 504
Alberta Dominion Election, *Re* ..... 486
Alloway v. Rural Municipality of St. Andrews ..... 407
Barrie v. Wright ..... 412
Bell v. Winnipeg Electric Street R. W. Co. ..... 405
Canadian Bank of Commerce v. McDonald ..... 506
Cass v. McCutcheon ..... 435
Clement v. Faircloth Co. ..... 524
Dakota Lumber Co. v. Rinderknecht ..... 481
Fisher and Village of Carman, *Re* ..... 455
Gilmour v. Simon ..... 417
Graham v. Frank ..... 510
Grey v. Stephens ..... 450
Hogan v. Baatz ..... 513
Hogan v. Baatz and Taylor ..... 513
Johannesson v. Galbraith ..... 445
Ledieu v. Roediger ..... 515
Lee v. Crow's Nest Pass Coal Co. ..... 527
Lillie v. Thomas ..... 467
Massey-Harris Co. v. Mollond ..... 424
McGregor v. Withers ..... 429
McLenaghan v. Hood ..... 422
McNichol v. Brucks ..... 478
Minuk v. White ..... 401
New Hamburg Manufacturing Co. v. Klotz ..... 471
North American Transportation and Trading Co. v. Olson ..... 518
Osment v. Blount ..... 497
Pearce v. Hart ..... 476
Penner v. Winkler ..... 403
Primeau v. Mouchelin ..... 484
Primeau v. Pantel ..... 434
Qu'Appelle Dominion Election, *Re* ..... 496
Rex v. Pickering ..... 521
Ritchie v. Canadian Bank of Commerce ..... 499
Savage v. Canadian Pacific R. W. Co. ..... 441
Sea, *Re* ..... 460
Thomas v. Clark ..... 512
Vancouver, City of, v. British Columbia Telephone Co. ..... 461
Vulcan Iron Works v. Leary ..... 453
Watkins, *Re* ..... 457
Watson v. Moggey ..... 424

Digitized by Google

# CHOICE LOTS OF ENGLISH REPORTS

## Law Times Reports

1859-1905, 90 vols. Very fine set.

## Weekly Reporter

1852-1904, 52 vols. The set in very fine library condition.

## The Law Reports

1866-1904, first-class library condition, half-calf throughout, bound to standard pattern.

## Law Journal Reports

Prices promptly on application for intending buyers.

**The CARSWELL CO., Limited**

LAW PUBLISHERS,

30 ADELAIDE ST. EAST - TORONTO


Digitized by Google

*Will be ready September, 1905. Over 1,800 pages in half-calf, $16.*

# THE JUDICATURE ACT

OF ONTARIO

AND

## THE CONSOLIDATED RULES OF

Practice and Procedure

OF THE

## SUPREME COURT OF JUDICATURE

For Ontario,

With Practical Notes

BY

GEORGE SMITH HOLMESTED

*Senior Registrar of the High Court of Justice*
*One of His Majesty's Counsel*

AND

THOMAS LANGTON, M.A., LL.B.

*One of His Majesty's Counsel*

**THIRD EDITION:**
**1905**

**MEMOS:**

Nearly every page shows marked changes from the edition of 1898. The appearances are that it will contain 1,852 pages, only 68 pages less than the edition of 1898, and yet the Forms of that edition are omitted from this edition, owing to the book of Forms published by the same authors in 1904. As the book will contain over 1,800 pages, the price must be not less, including binding, than $16. The price of the book of Forms, which contains nearly 1,100 pages, is $12, but purchasers of the two works, if ordered before the publication of the Practice, will be supplied at $26, and those who have already purchased and paid for the book of Forms will be allowed the price paid on account of an order of the 2 vols. for $26.

The Practice Volume refers to the Authors' Forms and Precedents.

THE CARSWELL CO., LTD.

Digitized by Google

THE

# WESTERN LAW REPORTER CANADA

Vol. I. AUGUST 1, 1905. No. 10

Subscription: Each volume 600 pages, $6.00.
Price per part of 25 pages, 50 cents.

EDITOR

E. B. BROWN, Barrister-at-Law.

REPORTERS

MANITOBA—The Reporter of the Manitoba Law Reports.

BRITISH COLUMBIA—P. S. Lampman, Barrister-at-Law, Supreme Court Reporter, Victoria.
G. E. McCrossan, Barrister-at-Law, Vancouver.
R. M. Macdonald, Barrister-at-Law, Nelson.
E. S. H. Winn, Barrister-at-Law, Rossland.

NORTH-WEST TERRITORIES — Thomas Powell, Official Court Stenographer, Regina.
W. L. Waines, Barrister-at-Law, Calgary.
J. T. Brown, Barrister-at-Law, Moosomin.
A. E. Doak, Barrister-at-Law, Prince Albert.
S. E. Bolton, Advocate, Edmonton.
Thomas A. Powell, Official Court Stenographer, Macleod.
J. Almon Valiquette, Court Reporter, Dawson, Y.T.
George Craig, Court Reporter, Dawson, Y.T.

The Carswell Company, Limited

TORONTO, CANADA

Digitized by Google

# CHOICE NEW LAW BOOKS

LINDLEY ON PARTNERSHIP, 7th ed. (38s.), cloth $8.50, hf. calf $9.00.

KERR ON RECEIVERS, 5th ed. (cloth 10s.), hf. bound $2.50.

POLLOCK'S EXPANSION OF THE COMMON LAW, $1.50.

NORTON-KYSHE'S DICTIONARY OF JUDGES' DICTA, $2.50, or Pollock & Kyshe, the two for $3.50.

ODGERS' LAW OF LIBEL AND SLANDER, 1905, cloth (32s.), $8.50, half calf $9.

DART'S VENDORS AND PURCHASERS, 1905, 2 vols. (£3 15s.), cloth $20, half calf $22.

**SOON TO ISSUE:**

*Will be ready September, 1905. Over 1,800 pages in half-calf, $16.*

# THE JUDICATURE ACT

of Ontario, and the Consolidated Rules of Practice and Procedure of the Supreme Court of Judicature for Ontario, with Practical Notes. By G. S. Holmested and T. Langton, M.A., LL.B., Members of His Majesty's Counsel. Third edition, 1905.

BENJAMIN ON SALE, probable London price 40s. to 42s., will be sold by us in half calf at $6.50.

THE CARSWELL CO., LTD.


## TABLE OF CASES, Vol. I. No. 10


PAGE

Alaska Packers' Association v. Spencer ..... 507
Bell v. Rokeby ..... 531
Cameron v. Overend ..... 545
Duggan v. Canadian Pacific R. W. Co. ..... 570, 576
Eggleston v. Canadian Pacific R. W. Co ..... 570, 576
First National Bank of Minneapolis v. McLean ..... 535
Fonseca v. Lake of the Woods Milling Co ..... 553
Gibson v. Coates ..... 556
Hickey v. Legresley ..... 546
Ireland v. Andrew ..... 575
Johnston v. Hurb ..... 565
Pacific Cold Storage Co. v. Troughton ..... 529
Perry v. Manitoba Milling Co. ..... 541
Rex v. Austin ..... 571
Rex v. Charles King ..... 570
Rex v. Nunn ..... 530
Rogers and Nunn, *Re* ..... 559
Ross Brothers Limited v. Pearson ..... 575
Stephens v. Olson ..... 572
Winnipeg Land and Mortgage Coporation v. Witcher ..... 551
Wright v. Battley ..... 569


Digitized by Google

**The Lot for $15**

# VALUABLE COMBINATION:

## Western Law Reporter

Volume 2, about 600 pages, subscription $6.

## Ontario Weekly Reporter

A Record of all Written Judgments of the High Courts of Ontario for the year 1905, 2 vols., over 1,600 pages, subscription $6.50.

## Canadian Law Times

Vol. 25. Leading Articles on subjects of interest to Canadian Lawyers; Notes of Cases of the Supreme Court, Exchequer Court and Courts of Quebec and the Maritime Provinces, about 400 pages.

## Digest

of all Cases published in Canada, including the W.L.R. and O.W.R., nearly 300 pages $3; subscription to the C.L.T. and the Digest, $5.

**The above valuable periodicals to one address for the year; consisting of over 3,300 pages, for $15.**

*Circulars and sample numbers sent on application.*

**The CARSWELL CO., Limited**

**LAW PUBLISHERS,**

**30 ADELAIDE ST. EAST - TORONTO**

Digitized by Google

# $10 ONLY

will supply you with a complete record of the judgments of the High Courts of England and House of Lords, etc.

# THE LAW JOURNAL REPORTS.

**The Oldest-established Reports, Commencing 1822.**

These old-established REPORTS are now in their 83rd year of existence, and the Proprietors would draw the attention of the Profession to some of the points upon which excellence is claimed for them.

## 1. SIMPLICITY OF ARRANGEMENT AND FACILITY OF REFERENCE—

There is only one volume in each year for each Division of the Courts.

The LAW JOURNAL REPORTS and Statutes for each year may be conveniently bound in 3 vols., or if thin paper is used, it can be bound in one convenient volume. The system of citation has not been materially altered for over 60 years.

## 2. CONCISENESS AND ACCURACY—

The LAW JOURNAL REPORTS form by far the most extensive and authoritative series of English Reports extant. The Editors have always endeavoured, and it is believed with success, to avoid prolixity, both in the head notes and in the statement of facts, and to restrict the Reports of Cases so far as is possible to the elucidation of the points of law decided in them. ON THE QUESTION OF ACCURACY the LAW JOURNAL REPORTS have NEVER been impeached.

## 3. MODERATE PRICE—

The subscription of the LAW JOURNAL, the LAW JOURNAL REPORTS, and the Statutes of the current session is only **£4 4s.** per annum.

Omitting the Statutes the above in Canada are $10, or as follows:

| | |
|---|---|
| Law Journal Reports - - - | only $10 00 |
| Statutes - - - - - - - - | 2 00 |
| Law Journal, Weekly - - - | 6 50 |

Thin paper issue will be supplied at the same price a year, $10. It can be bound in one neat volume, so that the year's reports will only cost $11.50.

Subscribers to Law Journal Reports are entitled to purchase "Mews' Annual Digest" with its quarterly issues for the same year, at $2.00.

**THE CARSWELL COMPANY, Limited,**

**LAW PUBLISHERS, 30 Adelaide Street East, Toronto.**


Digitized by Google

THE

# WESTERN LAW REPORTER

CANADA

AND

# INDEX-DIGEST

JANUARY-AUGUST, 1905

EDITOR:
E. B. BROWN, ESQUIRE,
BARRISTER, ETC.

VOLUME I.

TORONTO:
THE CARSWELL COMPANY, LIMITED
1905

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google